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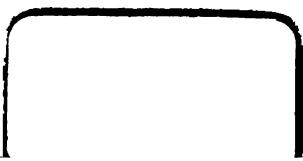
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THE LAW
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AS RESPECTS PROPERTY.
VOL. II.

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A

TREATISE

ON

THE LAW

OF

HUSBAND AND WIFE,

AS RESPECTS PROPERTY:

PARTLY FOUNDED UPON ROPER'S TREATISE, AND COMPRISING
JACOB'S NOTES AND ADDITIONS THERETO.

BY

JOHN EDWARD BRIGHT, ESQ.

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

IN TWO VOLUMES.

VOL. II.

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THE LAW
OF
HUSBAND AND WIFE,
AS RESPECTS PROPERTY.

CHAPTER XXII.

OF THE HUSBAND'S LIABILITY FOR HIS WIFE'S DEBTS AND
CONTRACTS.

SECTION I.

OF THE HUSBAND'S LIABILITY FOR HIS WIFE'S DEBTS
CONTRACTED BEFORE MARRIAGE.

- | | |
|---|--|
| <p>1. <i>Liable for wife's debts due at time of marriage.</i></p> <p>2. <i>Only liable during marriage.</i></p> <p>3. <i>Although he has received large fortune with wife.</i></p> <p>4. <i>Liability where wife's administrator.</i></p> <p>6. <i>Presumptive evidence of marriage sufficient.</i></p> | <p>7. <i>If husband dies before debt recovered, wife surviving liable.</i></p> <p>8. <i>Unless where husband insolvent or bankrupt, and discharged.</i></p> <p>9. <i>Where husband liable for judgments obtained for debts due by wife before marriage.</i></p> <p>11. <i>Execution on judgments against wife.</i></p> |
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1. As the law by marriage gives to the husband all his wife's personal estate in possession, and the power of recovering her personal property in action, it, not without reason,

makes him liable for his wife's debts owing at the period of marriage:

2. This liability, however, as it originates in the marriage, ceases with it; so that if the debts are not recovered during its continuance, the husband will be discharged if he survive his wife. (a)

3. The husband surviving will be discharged from liability although he may have received a large fortune with his wife; and this seems to be just, because his liability during her life would have been the same if he had received nothing with her.

4. But when property belonging to the wife vests in the husband, not in his marital right, but as the administrator of his wife, he is liable to the extent of her assets; for since he cannot recover her property outstanding at her death, except as her administrator, it will, as in ordinary cases, be assets to pay her debts.

5. Thus, in *Heard v. Stanford* (b), the defendant's wife, before marriage, gave a note for 50*l.* to the plaintiff in consideration of five years' service, and then married the defendant, who received with her a fortune of 700*l.*, part of which consisted of choses in action, some of which the defendant received as husband, and the remainder he took as administrator to his wife. The question was, how far in equity the husband was liable to pay this debt of his wife? And Lord Talbot, after detailing the law upon the husband's liability, decreed an account of what the husband had received since his wife's death as her administrator, and declared that the husband should be liable for so much only. And as to any further demand, he dismissed the bill.

6. In an action against the husband for a debt due by the wife *dum sola*, presumptive evidence of the marriage is sufficient. (c)

(a) Roll. Ab. 351.

Earl of Suffolk, 1 P. W. 465—468:

(b) 3 P. W. 409; Ca. Temp.

and *Tyler v. Lake*, 4 Sim. 150.

Talbot, 173: see also *Thomond v.*

(c) *Tracey v. M'Arlton*, 7 Dowl.

7. If the husband dies before the debt is recovered, the wife surviving is liable. (a)

8. But the wife surviving is not liable where the husband has been discharged under the insolvent debtors act (b), or, having been a bankrupt, has obtained his certificate. (c)

9. With respect to judgments obtained for debts owing by the wife whilst single, there is this distinction in regard to the husband's liability. If the judgment be recovered previously to the marriage, and the wife die before the suing out of execution, the husband will be discharged from the demand; but if the judgment had been recovered against both of them, and the wife died before execution, the husband will continue charged; because by the judgment the nature of the debt was altered, and from that time it became his own debt. (d)

10. And for the same reason if judgment be recovered against the wife while sole, and a *scire facias* be brought upon it after the marriage, against the husband and wife, and a judgment be obtained on the *scire facias*, the husband will be charged after the wife's death. (e)

11. When a judgment is obtained for a debt against a single woman, who afterwards marries, the execution upon it must be against her alone, because the execution must follow the judgment. (f) But if it be desired to charge a person with the debt recovered, who was no party to the

P. C. 533; S. C. Dacey v. M'Carter, 3 Jur. 124: and see Evans v. Morgan, 2 Crompt. & Jer. 453: and Leader v. Barry, 1 Esp. 353: but see Cowley v. Robertson and wife, 3 Campb. 438.

(a) Woodman v. Chapman, 1 Campb. 189.

(b) Lockwood v. Salter, 5 B. & Ad. 303; 2 Nev. & M. 255: but see Sparkes v. Bell, 8 B. & C. 1; 2 Man. & Ry. 126.

(c) Miles v. Williams, 1 P. W. 257: in re M'Williams, 1 Sch. & Lef. 169.

(d) Obrian v. Ram, 3 Mod. 186: Eyres v. Coward, Sid. 337: Treviban v. Lawrence, 2 Lord Raym. Rep. 1050.

(e) Obrian v. Ram, *ubi sup.*

(f) Cooper v. Hunchin, 4 East, 521. Where a woman who had given a warrant of attorney, married during the term, and was after-

record, as the husband in this case, a *scire facias* ought to be issued making him a party to it. (a)

12. And if a woman marries pending an action against her, and judgment be afterwards obtained against her alone, execution may issue against her by *capias ad satisfaciendum*, or by *habere facias possessionem*, in an action of ejectment. (b)

13. But her goods, having become the property of the husband, cannot be taken by *fieri facias* under this judgment. (c)

wards taken in execution upon a judgment signed as of that term, and therefore having relation to the first day of the term, it was held that she could not be relieved, *Triggs v. Triggs*, 2 M. & Ry. 126 n.

(a) *Cooper v. Hunchin*, 4 East, 521.

(b) *Ibid.*: *Thorpe v. Angles*, 1 Dowl. & L. 831; 13 Law J. N. S. Q. B. 143; 8 Jur. 602; Vin. Ab. Bar. & F. K. a.

(c) See *Doe v. Butcher*, 3 M. & S. 557; *Cooper v. Hunchin*, *ubi sup.*: and Vin. Ab. Baron & Feme, K a.

SECTION II.

OF THE HUSBAND'S LIABILITY FOR HIS WIFE'S DEBTS CONTRACTED DURING THE MARRIAGE.

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| <ol style="list-style-type: none"> 1. <i>Wife cannot contract without husband's express or implied authority.</i> 2. <i>Rule laid down.</i> 5. <i>Cohabitation presumptive evidence of authority.</i> 7. <i>But presumption repelled, if articles purchased are not necessities.</i> 8. <i>What will be considered necessities.</i> 9. <i>What are not necessities.</i> 10. <i>To be determined by jury.</i> 12. <i>Whether husband liable if wife borrow money to pay for necessities.</i> 13. <i>Not liable if wife adequately supplied, unless his authority proved.</i> 14. <i>Husband liable to greater extent if more extensive authority given.</i> | <ol style="list-style-type: none"> 15. <i>As where he allows her to buy or retain the articles.</i> 17. <i>Whether husband's authority given to be determined by jury.</i> 18. <i>Husband's assent for purchase of necessities implied if he turns wife out of doors.</i> 19. <i>Notice not to give credit to wife ineffectual.</i> 20. <i>Liable also where by ill-treatment wife obliged to leave him.</i> 21. <i>What ill-treatment will justify wife in leaving him.</i> 22. <i>Horwood v. Hoffer.</i> 25. <i>Effect of husband's request that she shall return.</i> 26. <i>Husband liable for necessities where separation by consent unless wife has provision.</i> 27. <i>Upon whom onus of proof lies where husband sued.</i> |
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1. WITH a view to the safety of the husband, the law disables the wife from making any personal contract, or incurring any debt to bind him, without his express or implied authority. (a)

2. The rule as to the husband's liability was thus laid down by Bayley, J., in the leading case of *Montagu v.*

(a) Gilb. Law of Evidence, 183: *Smith v. Sheriff of Middlesex*, 15 Earl of Derby's case, 4 Leon. 42: *East*, 607.

Benedict. (a) "If a man without any justifiable cause turn away his wife, he is bound by any contract she may make, for necessaries suitable to her degree and estate. If the husband and wife live together, and the husband will not supply her with necessaries, or the means of obtaining them, then, although she has her remedy in the Ecclesiastical Court, yet she is still at liberty to pledge the credit of her husband for what is strictly necessary for her own support. But whenever the husband and wife are living together, and he provides her with necessaries, the husband is not bound by contracts of the wife except where there is reasonable evidence to show that the wife has made the contract with his assent. (b) Cohabitation is presumptive evidence of the assent of the husband, but it may be rebutted by contrary evidence; and when such assent is proved, the wife is the agent of the husband duly authorised."

3. Thus the husband's liability may arise from the contract having been made by his wife as his agent, or from his improper refusal or neglect to supply her with necessaries.

4. In cases depending on the first of these grounds, the wife's authority to contract in her husband's name is either proved or inferred as a fact from the circumstances and the relation between them.

5. The circumstance of cohabitation is sufficient presumptive evidence of an authority to contract for necessaries (c),

(a) 3 B. & C. 635; see also the remarks of Lord Abinger, in the cases of *Emmett v. Norton*, 8 Car. & P. 506: and *Hardie v. Grant*, 8 Car. & P. 516.

(b) *Etherington v. Parrott*, Lord Raym. 1006.

(c) Bull. N. P. 134: *Langfort v. Tyler*, Salk. 113: *Atkins v. Curwood*, 7 Car. & P. 756: see also *Dier v. East*, 1 Ventr. 42: *Beaumont v. Weldon*, 2 Ventr. 155: *Manby v. Scott*, 1 Bac. Ab. 714, 7th ed.; 1

Mod. 124; 1 Sid. 109; 1 Roll. Abr. 351, pl. 5; *Bridgman's Judgments* by Bannister, 229: *Stone v. Walter*, ibid. 618. For the same reason, a man is liable for the debts of a woman with whom he cohabits, holding her out to the world as his wife. *Watson v. Threlkeld*, 2 Esp. 637: *Robinson v. Mahon*, 1 Campb. 245: see *Munro v. De Chemant*, 4 Campb. 215: *Blades v. Free*, 9 B. & C. 167.

for, as it was observed by Lord Abinger, C. B., in a late case (a), a wife would be of little use to her husband in their domestic arrangements if she could not order such things as are proper for the use of a house and for her own use without the interference of her husband. The law therefore presumes that she does this by her husband's authority.

6. This presumption will be the stronger if she has been permitted by him to purchase articles for the use of the house and family. (b)

7. But this presumption will be repelled, if, whilst the husband and wife live together, the articles purchased by the wife are not such as can be classed among those which can be considered as necessities; so that in the absence of the husband's express authority, it appears requisite to prove, with a view of fixing liability upon him, that in other instances of the like kind the wife was in the habit of purchasing similar articles with the concurrence of her husband (c); for if the goods are unsuitable to her rank in life, either in kind or quantity, and to her husband's circumstances, his authority for the contract or purchase will not be implied. (d)

8. Necessaries, besides board and lodging, are such articles as comport with the wife's situation in life and her husband's fortune, and are usually worn or possessed by persons in similar conditions of life. (e) Among the articles which have been considered as necessities are medicines, medical attendances, and reasonable expenses during illness (f); furniture of a house for a wife to whom the Court had decreed 380*l.* a year alimony (g); expenses incurred by the

(a) *Emmett v. Norton*, *antè*, p. 6.

(b) 1 Sid. 128.

(c) *Morton v. Withens*, Skin. 349.

(d) *Montague v. Benedict*, 3 B. & C. 631; 5 Dow. & Ry. 532: *Atkins v. Curwood*, 7 Car. & P. 756: *Montague v. Espinasse*, 1 Car. & P. 359.

(e) *Ozard v. Durnford*, Sel. N. P. 260: *Turner v. Winter*, *ibid.*: *Dennys v. Sargeant*, 6 Car. & P. 419: *Berreblook v. Michael*, Cro. Jac. 257, 258.

(f) *Harris v. Lee*, 1 P. W. 438.

(g) *Hunt v. De Blaquiere*, 5 Bing. 550.

wife in exhibiting articles of the peace against her husband (*a*); and this, although they were living apart, and he allowed her a separate maintenance (*b*); so also the costs of the proctor employed by her to defend a suit for a divorce. (*c*)

9. On the other hand, articles of jewellery have been held not to be necessities for the wife of a special pleader. (*d*) A deed of separation is not a necessary (*e*); nor is the husband liable for the expenses of an indictment by the wife for assault and imprisonment as such. (*f*)

10. What are to be considered necessities in each particular case, is a point to be decided by the jury. (*g*)

11. It seems that where the husband is liable, the tradesman may recover for articles supplied up to the date of the record. (*h*)

12. When the wife purchases necessities, and pays for them with money borrowed by her from a stranger for the purpose, although at law, as appears from the case of *Earle v. Peale* (*i*), such a loan could not be established against her husband, yet upon proof of the money having been properly

(*a*) *Shepherd v. Mackoul*, 3 Camp. 326: see *Williams v. Fowler*, *McClelland & Younge*, 269.

(*b*) *Turner v. Rookes*, 10 A. & E.; 2 Per. & D. 294.

(*c*) *Ex parte Moore*, 1 De Gex, 173; 14 Law J. N. S. Bank. 19; 9 Jur. 605. In suits in the ecclesiastical courts, the general rule is that the husband pays the costs on whichever side the suit begins, and as soon as the marriage is admitted or proved, the wife's proctor may call upon the husband for payment of his bill up to that time. *Bell v. Bird*, Sir G. Lee's Eccl. Cases, vol. 1. p. 209: *Portsmouth v. Portsmouth*, 3 Add. 67: *Beever v. Beever*, 3 Phill. 261: see *Belcher v. Belcher*, 1 Curt. 444: *Stone v. Stone*, 7 Jur. 1094. This rule has been established

to obviate the inconvenience and delay that might otherwise arise in the progress of the cause from the wife's want of funds, 1 Hagg. Eccl. R. 374. It, however, admits of an exception where the wife has separate property sufficient to maintain herself, and to carry on the suit. See *Wilson v. Wilson*, 1 Hagg. 203, and the cases there cited: and *Westmeath v. Westmeath*, 2 Hagg. Eccl. R. 133.

(*d*) *Montague v. Benedict*, 3 B. & C. 631.

(*e*) *Ladd v. Lynn*, 2 M. & W. 265.

(*f*) *Grindall v. Godmond*, 5 A. & E. 755.

(*g*) *Lane v. Iremonger*, 13 Mees. & Wel. 368; 14 Law J. N. S. Ex. 35: *Harvey v. Norton*, 4 Jur. 42.

(*h*) *Joll v. Fisher*, 5 Car. & P. 514.

(*i*) 1 Salk. 387.

applied, a Court of Equity will interfere, and allow the creditor to stand in the place of the persons who actually supplied her with the necessaries, to receive satisfaction against the husband, to the value of the articles proved to have been delivered to her. (a)

13. But if the wife is adequately supplied with necessaries by the husband, she is not his agent for the purchase of even a single article, unless an express authority be shown to have been given by the husband, or an authority can be implied by the fact of his having seen her wear the articles furnished without expressing any disapprobation. (b)

14. The wife's contracts during cohabitation will bind the husband to a greater extent if the evidence warrants the inference that a more extensive authority has in fact been given. (c)

15. Thus the husband will be liable when the goods purchased by her (to the payment for which he would not be liable) come to her or his use with his knowledge and permission, or when he allows her to retain and enjoy them. In such cases the law considers the wife as her husband's agent, and implies a promise on his part to pay for the articles.

16. So also when the husband permits his wife to assume an appearance beyond his ability to support, the like authority and promise will be presumed. (d)

17. Whether the acts of the wife were done by the authority of the husband, is a question for the jury. (e)

(a) *Harris v. Lee*, 1 P. W. 483. In *Jenkins v. Fisher*, 1 H. Bl. 90, where the husband went abroad, leaving his wife, who died in his absence, it was held that a third person who voluntarily paid the expenses of her funeral, might recover them from him.

(b) *Seaton v. Benedict*, 5 Bing. 28; 2 Moo. & P. 74; *Etherington v. Parrott*, 2 Ld. Raym. 1006.

(c) As to evidence of the hus-

band's assent, see the cases cited in the reporter's note to *Filmer v. Lynn*, 4 Nev. & Man. 559; see also *M'George v. Egan*, 7 Scott, 112; and *Plimmer v. Sells*, 3 Nev. & Man. 422.

(d) *Waithman v. Wakefield*, 1 Campb. 120.

(e) *Attorney-General v. Riddle*, 2 Cr. & Jer. 493; 2 Tyr. 523; *Barnes v. Jarrett*, 2 Jur. 988.

18. With respect to the other ground of the husband's liability, namely, his improper refusal to supply his wife with necessaries : when the husband has turned his wife out of doors without provision and without sufficient cause, his assent to her contracts for the purchase of articles of necessity is implied by a fiction of law founded on his duty to provide such articles for her, and independent of any evidence from which it can be inferred as a fact that she has his authority to bind him.

19. Hence he is not discharged from the liability by showing that the contract was in fact made without his authority and contrary to his wishes, as by proving a general advertisement or particular notice to individuals not to give credit to his wife. (a)

20. The husband is liable in like manner where he, by cruel or ill-treatment, has obliged his wife to leave her home, for this is equivalent to turning her out of the house. (b)

21. But the ill-treatment which would justify the wife in leaving her husband's house must be such as to excite a well-grounded apprehension for her personal safety, not merely such as a fanciful woman may entertain, but such as a jury shall esteem to have been felt upon reasonable grounds. (c)

22. In *Horwood v. Hoffer* (d), it was held that the husband was not liable for necessaries supplied to his wife who had quitted him in consequence of his having placed a profligate woman at the head of his table; it was considered necessary to show that she had either been driven from the house by actual violence, or apprehension for her personal safety.

23. But in another case (e), Lord Ellenborough observed,

(a) *Harris v. Morris*, 4 Esp. 41 : (c) *Houlston v. Smyth*, 3 Bing. Boulton v. Prentice, 1 Selw. N. P. 127; 10 Moo. 482; 2 Car. & P. 22. 298, 11th ed.; 2 Strange, 1214. (d) 3 Taunt. 421.

(b) *Hodges v. Hodges*, 1 Esp. N. (e) *Liddlow v. Wilmot*, 2 Stark. P. C. 441. 87.

that the husband was bound to afford his wife means of support, if by the indecency of his conduct he precluded her from living with him. And in *Aldis v. Chapman* (*a*), he held that, when a husband by bringing another woman under his roof, renders his house unfit for the residence of his wife, who thereupon removes, and lives apart from him, he is bound to provide her with necessaries during the separation.

24. So, in the case of *Houliston v. Smyth* (*b*), Best, C. J., held not only that a woman was not bound to wait till actual violence was committed, and that if there was reasonable ground for apprehension, she might fly from her husband; but also said that the doctrine in *Horwood v. Hoffer*, that a woman was not justified in leaving her husband's house when he placed a profligate woman at his table, could not be law.

25. When the wife has been justified in leaving her husband, his liability will not be determined by a request on his part that she shall return. (*c*)

26. In the middle case, between that where the husband and wife are living together, and where the wife has left her husband, namely, where they have separated by mutual consent, the husband is liable for necessaries supplied to the wife, unless she has a competent provision either from her husband or from her own resources. (*d*)

27. As cohabitation is presumptive evidence of the wife's authority to contract, it is for the husband to rebut that presumption by showing that the goods were supplied under such circumstances that he is not bound to pay for them; but where the husband and wife are living apart, the *onus* lies the other way, and it is for the tradesman to show that

(*a*) 1 Selw. N. P. 298, 11th ed.

(*c*) *Emery v. Emery, ubi sup.*

(*b*) 3 Bing. 127; 10 Moo. 482; 2

(*d*) *Dixon v. Hurrell*, 8 Car. & Car. & P. 22: see also *Emery v. P.* 717.

Emery, 1 Younge & Jer. 501.

the separation has taken place under such circumstances as will render the husband liable. (a)

28. In the case of *Bird v. Jones* (b), where an action was brought against a husband for goods supplied to his wife during his absence from England, it was held that it lay upon the plaintiff to show what means of subsistence the wife possessed.

SECTION III.

WHAT WILL DISCHARGE THE HUSBAND FROM HIS LIABILITY FOR HIS WIFE'S DEBTS.

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|---|---|
| 2. <i>Discharged where wife leaves him without sufficient cause.</i> | 18. <i>Or where agreement not to charge him.</i> |
| 3. <i>Effect of wife's offer to return.</i> | 19. <i>Who bound to pay for goods supplied to wife where husband's death unknown.</i> |
| 5. <i>Where wife leaves him he ought to give notice to tradesmen.</i> | 21. <i>Husband, on separation, not liable if wife has allowance.</i> |
| 6. <i>But discharged if creditor aware of wife's departure.</i> | 22. <i>Except for liabilities caused by his misconduct.</i> |
| 7. <i>Wife's elopement and adultery a discharge.</i> | 23. <i>But allowance must be adequate.</i> |
| 8. <i>But husband again liable on taking her back.</i> | 24. <i>Except in case of alimony.</i> |
| 9. <i>Adultery of wife having left husband from his misconduct a discharge.</i> | 25. <i>And must be duly paid.</i> |
| 11. <i>Exception to rule that wife's adultery is a discharge.</i> | 26. <i>Husband not discharged by mere covenant to pay allowance.</i> |
| 13. <i>Whether wife liable when husband discharged.</i> | 28. <i>Or by assignment of property where trustees for wife had not taken possession.</i> |
| 14. <i>Husband discharged where goods not supplied on his credit.</i> | 29. <i>Not material that allowance be secured by deed or writing.</i> |
| | 30. <i>Where husband liable, though separate maintenance paid.</i> |
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1. We shall now consider the circumstances which will discharge the husband from his obligation to keep and

(a) *Mainwaring v. Leslie*, 2 Car. & P. 507; 1 Mood. & Mal. 18; *Clifford v. Laton*, 3 Car. & P. 15; 1 Mood. & Mal. 101: see also *Bird v. Jones*, 3 Man. & Ry. 121; S. C., *Burge v. Jones*, 7 Law J., K. B. 59.
(b) *Ubi sup.*

maintain his wife. The husband will be exempt from this duty in all cases when the nature of the transaction is such as to preclude all possibility and even propriety to raise an implication that the wife acted under his authority.

2. Thus, if the wife leave her husband's house of her own accord, and without a sufficient provision, the law, for want of cohabitation (which is the foundation of his liability to support her), cannot continue the implied authority from him to her to purchase necessities, which, in consequence of her own act, he was not bound to furnish. (a)

3. Yet if, during her absence, she conduct herself with propriety, and offer and submit to return to her husband, and he refuse to receive her, then, according to the opinions of some persons, debts contracted by her from that period for necessities will bind him; the implied authority for that purpose, which the law had suspended, being revived. (b)

4. It may, however, be doubted whether these opinions are correct; for since the wife, by her own voluntary act, discharged her husband from his obligation to maintain her, by unnecessarily quitting his house without his consent, it is but reasonable that his liability to support her afterwards should not be revived by implication without his express concurrence in consenting to his wife's return to his protection, or until their cohabitation was restored either by mutual agreement, or by the sentence of the Ecclesiastical Court. (c)

5. But until it has become notorious that the wife has withdrawn herself from her husband's care and protection, his liability to engagements for necessities will, as it seems,

(a) *Etherington v. Parrott*, 2 Ld. Raym. 1006; *Longworthy v. Hockmore*, cited 1 Ld. Raym. 444; *Manby v. Scott*, 1 Sid. 130; 1 Keb. 430; *Bailey v. Callcott*, 4 Jur. 699. *Rawlins v. Vandyke*, 3 Esp. 251; *Edwards v. Towell*, 5 Man. & G. 624; 12 Law J. N. S. C. P. 239; *Hindley v. Westmeath*, 6 B. & C. 200; 9 Dowl. & Ry. 351.

(b) *Manby v. Scott*, 1 Sid. 129; 1 Keb. 365; 1 Mod. 131; 1 Lev. 4: *Child v. Hardyman*, 2 Stra. 875; (c) But see *Reed v. Moore*, 5 Car. & P. 200.

continue (a); so that he ought to give *particular* notices to tradesmen not to give her credit upon his responsibility. The propriety and necessity for such notices are apparent from the secrecy attending the wife's departure, and the improbability of her elopement being generally known until some time afterwards.

6. But proof by the husband of the creditor's knowledge of the wife's departure and living separately from him, will protect him against the demand. (b)

7. As the wife's departure from her husband without a sufficient reason exempts him from the duty of supporting her, it follows, that her elopement, accompanied with adultery, will discharge him from all obligation to find her necessaries, and consequently he will not be bound by her contracts for them (c); for, under such circumstances, it would be unreasonable to continue the implication of his authority to her to procure necessaries; and, in such an aggravated case, his refusal to take her again will not revive his obligation to maintain her.

8. But if he voluntarily pardon her misconduct, and take her back, he becomes again liable. (d)

9. It may, however, happen that the wife, after being under the necessity of leaving her husband from his misconduct (in which case his liability to support her continues), may, by her own act, discharge him from his obligation to find her necessaries. This will occur if, after she has been turned out of doors by her husband without sufficient reason, she commit adultery.

(a) *Hodge v. Cooper*, 10 Law J. N. S. C. P. 218.

(b) 2 *Ld. Raym.* 1006: *Todd v. Stokes*, 12 *Mod.* 245; 1 *Ld. Raym.* 444: *Manby v. Scott*, 1 *Mod.* 124; 1 *Sid.* 127, 128: *Norton v. Fazan*, 1 *Bos. & Pull.* 226: *Hinton v. Hudson*, *Freem. Rep.* 248.

(c) *Morris v. Martin*, 1 *Stra.* 647: *Manwaring v. Sands*, 2 *Stra.* 707:

Hardie v. Grant, 8 *Car. & P.* 512.

A man is not liable to the penalty of 5 *Geo. 4. c. 83. sect. 3.* for refusing to maintain his wife, who has left him, and committed adultery, although he has himself afterwards been guilty of that offence, *Rex v. Flintan*, 1 *B. & Ad.* 227; 9 *Law J. Mag. Ca.* 33.

(d) *Harris v. Morris*, 4 *Esp.* 41.

10. Thus, in *Govier v. Hancock* (*a*), the demand was for the wife's board and lodging, and it appeared that her husband had first misconducted himself, and committed adultery with a woman whom he brought home, and that he afterwards ill-treated his wife and turned her out of doors. It was also in evidence that she, after being so expelled, committed adultery, and at last offered to return home; but her husband would not receive her. The Court was of opinion that the plaintiff could not recover his demand against the husband, and said, that, although the precise case did not appear to have been before controverted, the probable reason was, that the point had not been doubted, and that it must be governed by the same principle upon which it had been determined that the husband was not liable in cases where his wife went away with an adulterer; that the rule was not modern, but was mentioned by Lord Coke in regard to dower (*b*); that the question was, whether the necessities were provided before or after she had committed adultery? If after, the action could not be maintained, and that in the present case if the wife had instituted a suit in the Ecclesiastical Court against her husband for a restitution of conjugal rights, that Court would not have assisted her.

11. But each case depends upon its own particular circumstances; and an instance may occur in which the adultery of the wife will not discharge her husband from his obligation to maintain her. Thus, where the wife has committed adultery for some time in her husband's house, unknown to him; but that so soon as he has become acquainted with the circumstance, he, instead of turning her out of doors publicly, leaves his own house, and permits her to continue in possession of it with the adulterer; in such a case it is expedient for the safety of the public, and their dealings one with another, that the implied authority of the

(*a*) 6 Term Rep. 603: see Norton (b) Co. Litt. 32.
v. Fazan, 1 Bos. & Pull. 339.

husband to his wife to purchase necessities should not abruptly determine, so that in this instance, until their separation and her misconduct become notorious, her husband will be liable to the creditor for necessities.

12. This point was determined in *Norton v. Fazan*. (a) The plaintiff brought an action against the husband for necessities sold to his wife and children, and it appeared that some time before the delivery of the goods, the husband having discovered that his wife kept up an adulterous intercourse with another man, quitted her, leaving her in possession of his house, with two children bearing his name, and in which house the adultery was carried on. The wife was without a regular provision. The Court decided that the plaintiff was intitled to recover, because the wife was permitted to remain in her husband's house with her children, in which she had been placed by him, and was consequently enabled to procure goods upon his credit. But Eyre, C. J., said, that if the husband, in any other action, should be able to establish the notoriety of his wife's situation, he might defend himself; or that if he should be able to prove that the plaintiff in such action knew, or ought to have known the circumstances under which the wife was living, he might perhaps be able to prevent another verdict passing against him. (b) Buller, J., observes: "The wife committed adultery for a considerable time whilst she was living with her husband, and he voluntarily yielded his bed to the adulterer, and made no provision for her. What colour of defence is left? Knowing of her criminal conduct, and having made no provision for her, he must maintain her as before."

13. As to the *wife's* liability under such circumstances, Mr. Roper remarks (c), "Suppose, then, the husband's

(a) 1 Bos. & Pull. 226.

(b) This seems, as Mr. Jacob notices, (2 Rop. H. & W. 117_n) to have proceeded upon the principle that as the wife continued in her husband's house, the plaintiff, if

ignorant of the circumstances under which she was living, had no means of knowing that her authority to contract as her husband's agent was withdrawn.

(c) 2 Rop. H. & W. 117.

obligation to support his wife to cease by her leaving his home, and that she is without any provision; it may be asked, who is to be answerable for her necessary debts and engagements? The argument in favour of her personal responsibility is, that when the husband ceases to be her protector, and is not liable to have any claim made upon him for her support and maintenance, it follows of necessity that she must be her own protectress, make contracts for herself, and be responsible for them. Of this opinion, Buller, J., seems to have been in *Cox v. Kitchen* (a); but the Court did not decide upon the wife's personal responsibility merely as a consequence of separating herself from her husband, and living in adultery, but because she had, after leaving her husband, lived as, and represented herself to be, a single woman, and obtained credit in that character. This question, however, has been settled in the great case of *Marshal v. Rutton*. (b) Lord Kenyon, in adverting to the above argument, urged in support of the wife's liability, observed, that it was not a necessary consequence of the determination of the husband's responsibility, that she should be at liberty to act as a feme sole; for if that were so, it would hold in all cases, but that the contrary was the truth; for if a woman eloped from her husband, withdrawing herself from his protection, and lived in adultery, he was not by law liable to answer for her necessities, and no case had decided that she was so; and that any persons knowing her condition, if, instead of requiring immediate payment, gave credit to her, they had no greater reason to complain of not being able to sue her, than others who had nothing to confide in but the honour of those whom they trusted.

14. In all cases the husband will be discharged if it appear that the goods were not supplied on his credit, but that the party supplying them trusted to the wife. (c)

(a) 1 Bos. & Pull. 339.

22: Bentley v. Griffin, 5 Taunt.

(b) 8 Term Rep. 547.

356: Taylor v. Britten, 1 Car. &

(c) Metcalfe v. Shaw, 3 Camp. P. 16 n.

15. Thus, where the husband during a temporary absence made an allowance to his wife, he was held not to be liable for necessities supplied to her, the tradesman having trusted to her promise to pay him out of her allowance. (*a*)

16. So he has been held not to be liable where the dealing with the wife took place on the credit of another (*b*), and where the tradesman made out the invoices and accounts to the wife, and drew bills of exchange for her to accept. (*c*)

17. But where a wife carried on business on her own account during the imprisonment of her husband, he was held liable for articles furnished with his knowledge after his return home, although the invoices and receipts were made out in the name of the wife, and she was rated to and paid the poors and paving rates. (*d*)

18. It need hardly be noticed that the husband is not liable where the tradesman has agreed not to charge him. (*e*)

19. It seems that the husband's executor is not bound to pay for goods supplied to the wife after her husband's death, although before information of his death has been received. (*f*)

20. And as, in such a case, the wife is not liable, it follows that no one is liable. (*g*)

21. Where the husband and wife have separated, by mutual agreement, the husband will not (as it is presumed) be liable to the debts of his wife, if, upon separation, he provide her with a proper allowance for maintenance (*h*), and pay it regularly afterwards.

(*a*) *Holt v. Brien*, 4 B. & Ald. 252: see also *Montague v. Benedict*, 3 B. & C. 631; *S. C. Montague v. Barron*, 5 Dowl. & Ry. 532.

(*b*) *Harvey v. Norton*, 4 Jur. 42.

(*c*) *Freestone v. Butcher*, 9 Car. & P. 647.

(*d*) *Petty v. Anderson*, 3 Bing. 170; 10 Moo. 577; 2 Car. & P. 38.

(*e*) *Dixon v. Hurrell*, 8 Car. & P. 717.

(*f*) *Blades v. Free*, 9 B. & C. 169.

(*g*) *Smout v. Ilbury*, 10 Mees. & Wel. 1.

(*h*) *Todd v. Stokes*, 1 Salk. 116; 1 Ld. Raym. 444; 2 New Rep. 148; *Hindley v. Westmeath*, 6 B. & C. 200; 9 Dow. & Ry. 351: *Mizen v. Peck*, 3 Mees. & Wel. 481: *Reeve v. Marquis of Conyngham*, 2 Car. & K. 444.

22. However, such an allowance will not exempt him from liabilities caused by his own misconduct. (*a*)

23. The allowance for maintenance must not be precarious (*b*), and it must be suitable to the husband's fortune and rank in life, which is a question proper for the consideration of a jury; and if it be found to be inadequate, the husband, as it seems, will not be discharged at law from his liability to answer for his wife's contracts for necessities; and her acquiescence in receipt of the allowance will not affect the rights of her creditors against him. (*c*)

24. The payment of alimony, although insufficient, will discharge the husband from such liability. (*d*) But the husband is liable for necessities supplied to the wife before alimony is decreed, although the decree afterwards directs the alimony to commence from a day preceding the supply of the necessities. (*e*)

25. The maintenance must not only be adequate to the circumstances and condition in life of the husband, but as it was decided in *Nurse v. Craig* (*f*), the husband will not be discharged from his liability to her creditors unless it is duly paid; the averring of which payment is usual, and seems necessary in the declaration at law: and this will be the case where alimony has been decreed. (*g*)

26. The case of *Nurse v. Craig* establishes by the opinion of three judges against that of Mansfield, C.J., that the mere covenant or contract of the husband to pay separate maintenance will not discharge him from his obligation at law to support his wife, and that a creditor who has furnished her with necessities may sustain an action against him for the payment of the debt.

(*a*) *Turner v. Rookes*, 10 A. & E. 47; 2 Perr. & Dav. 294.

(*b*) *Thompson v. Harvey*, 4 Burr. 2177.

(*c*) *Hodgkinson v. Fletcher*, 4 Camp. Rep. N. P. 70.

(*d*) *Willson v. Smyth*, 1 B. & Ad. 801.

(*e*) *Keegan v. Smith*, 5 B. & C. 375.

(*f*) 2 New Rep. C. P. 148. 153—156: *Hindley v. Westmeath*, 6 B. & C. 200; 9 Dow. & Ry. 351.

(*g*) *Hunt v. De Blaquièrre*, 5 Bing. 650; 3 Moo. & P. 108.

27. The principle is thus stated by Mr. Justice Heath: "It is the duty of the husband to provide necessaries for his wife; the question is, whether he discharges that duty by merely entering into a covenant with a trustee for payment of an allowance. If he refuse to perform that covenant, the wife may be starved before redress can be obtained. The common law does not relieve any man from an obligation, on the mere ground of an agreement to do something else in the place, unless that agreement be performed." (a)

28. For similar reasons it has been held, that the husband was not discharged from his liability for his wife's necessary expenses, by a separation deed assigning her property to trustees for her separate use, when it did not appear that the trustees had taken possession. (b)

29. And since it is the payment of the allowance which discharges the husband, it is immaterial whether it be or be not secured by deed or writing. (c)

30. It seems that the payment of a separate maintenance, though it discharges the husband from the liability to his wife's debts, so far as it arises from his duty to maintain her, may still leave him open to the demands of persons dealing with the wife, under the supposition that she is still authorized by him to contract upon his credit. It being in general presumed that in the purchase of articles of necessity, the wife has the authority of the husband to contract as his agent, it follows that her contracts, like those of any other agent, will bind him until it be known that that authority has been withdrawn. Thus, in *Rawlins v. Vandyke* (d), the wife lived upon a separate allowance; but the husband had occasionally visited her, and paid bills for her. Lord Eldon ruled, that he was liable for goods furnished to her by a tradesman, not having notice of the allowance; the notice of

(a) See *antè*, p. 6.

Camp. 70: *Holden v. Cope*, 2 Car. &

(b) *Burrett v. Booty*, 8 Taunt.

K. 437.

343.

(d) 3 Esp. 250.

(c) *Hodgkinson v. Fletcher*, 4

the allowance would be notice of the husband's dissent. (*a*) It is not, however, necessary to prove express notice; the general notoriety of the fact, that the husband and wife are separated, is sufficient. (*b*) If the creditor has reason to know that the contract has been made without the husband's assent, his claim must depend upon the question, whether the husband is still bound to furnish his wife with necessaries.

31. It has been seen that where the credit is given to the wife, the party trusting to her alone, the husband is not liable. (*c*) And on this principle it seems to follow, that, even if no separate allowance were paid, the husband might be discharged if it could be established to the satisfaction of the jury, that the dealing took place solely on the credit of the wife.

32. In a case where the wife was living separately on an allowance, the husband, having promised to pay a debt contracted by her, was held liable. (*d*)

(*a*) See *antè*, p. 16. note; and *Hinton v. Hudson*, Freem. 248.

(*c*) *Antè*, p. 18.

(*b*) See *Ozard v. Darnford*, 1 Selw. N. P. 294, 11th ed.: *Mizen v. Peck*, 3 Mees. & Wel. 481: see also *Reeve v. Marquis of Conyngham*, 2 Car. & K. 444.

(*d*) *Hornbuckle v. Hornbury*, 2 Stark. 177: see also *Harrison v. Hall*, 1 Moody & Rob. 185.

CHAPTER XXIII.

OF THE LIABILITY OF THE HUSBAND OR WIFE FOR A DEVASTAVIT, WHERE THE WIFE IS EXECUTRIX.

SECTION I.

OF THE HUSBAND'S LIABILITY.

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| 1. <i>Husband surviving not liable for devastavit by wife before marriage.</i>
2. <i>Whether liable for devastavit by wife during marriage.</i>
4. <i>Liable at law if he has concurred in devastavit.</i> | 5. <i>And in equity.</i>
6. <i>Cases collected in Adair v. Shaw.</i>
14. <i>Clough v. Dixon: husband's estate held liable after his death.</i>
16. <i>What proceedings at law will fix husband after wife's death with her devastavit.</i> |
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1. IF the wife before marriage, being an executrix or administratrix, wastes her testator's or intestate's assets, it seems that, except as administrator to his wife, and to the extent only of her assets, the husband surviving will not be liable in respect of the *devastavit* (a), because his liability

(a) A *devastavit* is a personal *tort*, which, according to the maxims of the common law, *moritur cum personâ*. Hence, if the person committing it died before a compensation was recovered for the injury, the common law gave no damages out of the assets in satisfaction of the *tort*, *Bailey v. Birtles*, Sir T. Raym. 71. But where not only a *tort* is committed, but property is acquired be-

nefitting the deceased wrong-doer or his estate, it seems that an action, not founded upon the *tort*, but to recover the *value* of the property, will lie against his executor, *Sherrington's case*, Sav. 40: *Hambly v. Trott*, Cowp. 371: *Perkinson v. Gilford*, Cro. Car. 540. And now, by the 3 & 4 W. 4. c. 42. sect. 2, an action may be brought against the executors for any injury committed by the

to the payment of such of her debts as were contracted previously to the marriage could only be enforced during the coverture.

2. Where the *devastavit* has been committed by the wife during the marriage, Mr. Roper (a) lays it down that the husband surviving will not be answerable at law, if he did not concur in the misapplication, and if he received no advantage from it; for it was not his debt, and there is no legal form of proceeding by which he or his estate can be made subject to the demand; and since he is discharged by the rule of law, the same rule will discharge him in equity, there being nothing in either case to found the jurisdiction of either tribunal.

3. "But," as Mr. Jacob observes (b), "the husband is generally chargeable in equity for the acts of his wife as executrix or administratrix; as she has no power to act alone, his assent will in general be presumed. (c) Hence, in *Sander-son v. Crouch* (d), *Sturt v. Harvey* (e), and *Adair v. Shaw* (f), the husband's estate was made responsible for what had been received by himself or his wife during the coverture."

4. If the husband had concurred with the wife in the *devastavit* committed during the marriage, and received the whole or part of the property misapplied, then it seems that he would, notwithstanding his wife's death, be liable even at law for the amount or value received by him; for the principle of law is to create a charge wherever property bound to a particular duty comes to a person's hand, which he misapplies, and to give redress whenever its forms will

deceased wrong-doer to another in respect of his property, provided the injury had been committed within six calendar months before the death of the wrong-doer, and the action is brought within six calendar months after the executors have taken upon themselves the administration of the estate.

(a) 1 Rop. H. & W. 191.

(b) Ibid.

(c) See 1 Sch. & Lef. 266.

(d) 2 Vern. 118.

(e) Cited p. 27. *infra*.

(f) 1 Sch. & Lefroy, 243.

admit. And for such parts of the assets as may remain in his hands, or in the possession of his executors, at his death, in *specie*, an action of detinue or trover may be supported for the recovery of them.

5. Whether, indeed, the forms of law could or could not be applied so as to afford a remedy in the case now under consideration, a Court of Equity will interfere, and charge the surviving husband or his estate in the hands of his executor, upon the principle that the misapplication of the husband was of trust property, and of his obligation by such trust to apply the funds received by him in discharge of debts and legacies, and the surplus according to the will of the wife's testator; or if it were intestacy, then according to the statute of distribution.

6. The cases establishing this head of equity are collected and commented upon by Lord Redesdale, in his elaborate judgment in *Adair v. Shaw*. (a) He there expressed his disapprobation of the report of *Beynon v. Gollins* (b), and afterwards proceeded to the examination of the other cases upon this point.

7. He observed, that the first case which showed most clearly what Courts of Equity thought upon the subject of charging the husband upon his own *devastavit* of assets belonging to his wife, as administratrix or executrix, when she died leaving him the survivor, was *Sanderson v. Crouch*. (c) In that case a man married an administratrix, who had previously wasted part of the assets; a bill was filed against them for a distribution, and she died. The Court declared that her husband was to be no farther charged than with what was possessed or came to his or to his wife's hands after their inter-marriage. By this declaration, the Court showed its understanding to be, that for the

(a) 1 Sch. & Lefroy, 243.

(c) 2 Vern. 118.

(b) 2 Brown, C. C. 323; 2 Dick.

waste committed by the wife before the marriage, her death absolved her husband, upon the principle before stated ; but for what came to both their hands after the marriage, her death did not discharge his liability to answer.

8. In allusion to the case of *Batchelor v. Bean* (a), his Lordship observed, that it was decided but a year and a half before *Sanderson v. Crouch* ; and that although it did not clearly appear what was the decision, yet that on comparing the two cases together it would be found that the same kind of determination was made in both of them.

9. The next case which he considered was *Norton v. Sprigg*. (b) This, said his Lordship, was a very short and confused note. The question was on exceptions to the Master's report, how far a second husband should be charged in his own estate for a *devastavit* committed by his wife and her first husband. The Court said, that where there was a bond there was a lien by deed, therefore the second husband was bound ; but that where there was merely a breach of trust or debt by simple contract, there in equity the plaintiff ought to follow the estate of the wife, in the hands of the executor of the first husband. Upon this declaration, Lord Redesdale observed, it was difficult to discover its exact meaning, but it seemed to import that the second husband should be relieved out of the assets of the first, viz. if the first husband possessed himself of assets of the testator, then the second husband, who was chargeable with the wife's debts, was intitled to be relieved out of the estate of the first husband, he having possessed himself of that which was not given to him by the marriage, and of which he had no other right to possess himself than for the purpose of protecting himself against the demands of the testator's creditors, to which he was liable as the husband of the administratrix ; that it seemed there was a right in this case in the second husband to redeem, by following the assets of

(a) 2 Vern. 61.

(b) 1 Vern. 309.

the first husband to recover what had been received by him; but that nothing could be inferred from the case, except that was the understanding of the Court, which might be guessed to have been so, from the note in 1 Equity Cases Abridged (a), referring to *Gilpin v. Smith*, which determined, that if there were no assets of the first husband, the second husband must pay the debts of the wife; hence implying that if there were assets of the first husband, the second was intitled to be relieved out of them. But his Lordship said that *Gilpin v. Smith* (b) did not warrant what was said of it. It was there held, that when a wife, after the death of her first husband, entered and took the profits (of lands settled for the payment of debts), and married again, and she and her second husband continued to take the profits, and he dying, she married a third husband, who also continued to take the profits, such third husband was bound to answer not only for the profits received by himself and his wife, when sole, but also for what had been received by the second husband; that Maynard in argument said, that both in law and equity Smith and his wife were answerable for the profits taken by the wife, and afterwards by her second husband; as if wife tenant for life marry, and the husband commits waste, and dies, an action of waste lay against her. But Lord Redesdale observed, that waste did not in that case lie at law against the executor of the husband; yet according to the case of *Sherrington* and other cases, if the waste had been of a profitable nature, the assets of the second husband would have been answerable, and reasonably so, in relief of the wife and her third husband; nevertheless the wife and third husband would be *primâ facie* liable to creditors, upon which ground these cases went.

10. The next case which came in review was *Powell v. Bell* (c). There an administratrix having wasted great part

(a) Page 60, pl. 4.

(b) 1 Chanc. Ca. 80.

(c) 1 Eq. Ca. Abr. 61; Pre. Ch. 255.

of the assets before her second marriage, a suit was instituted for an account of the estate against her second husband after her death. By the decree an account was directed of what had come to her hands before her second marriage; and it was declared that the plaintiff should have satisfaction absolutely against the second husband, for so much as came to his hands, after marriage, and to have satisfaction against him for what came to her hands before the second marriage, so far as he had any estate of the wife; which Lord Redesdale understood to mean, so far as the second husband had any estate in the character of her administrator.

11. *Upwell v. Halsey* (a) was now considered by his Lordship. A gave personal property to his wife for life, and then to his sister, and appointed his wife executrix. She married Halsey, and died. It was decreed that Halsey should account for what came into his hands. In that case, the wife possessed the property, and retained the surplus as executrix; she was a trustee to pay herself the interest for life, and to preserve the capital for her first husband's sister. The second husband was decreed to account for so much as came to his hands, but was not made answerable for what his wife might have wasted before the marriage: it was considered that the money being trust money, the marriage was not a gift of it to him; and he was held bound by the same trust of it as his wife.

12. The case of *Pagett v. Hoskins* (b) proceeded upon the same principle. Any specific assets of the wife's testator may be followed into the hands of the husband after her death, and so, as in that case, although not in specie, if the husband had notice that they were the goods of the testator.

13. The last case noticed was *Sturt v. Harvey*, the decision in which Lord Redesdale considered as the course of the Court established in a number of cases. Harvey had married the mother of Mrs. Sturt. Mr. Sturt got a large

(a) 1 P. W. 651.

(b) Pre. Ch. 431.

fortune with his wife, and filed a bill to obtain different properties out of Harvey's hands. The cause was heard in February, 1771; and part of the decree was, that Harvey should account for such of the personal estate of his wife's former husband as had come to her hands before her marriage with him (Harvey), or to his own or his wife's hands since; and that he should be answerable for what had come to their or either of their hands since the marriage, and for what had come to her hands before, that he should be answerable out of her assets, if he admitted any; and if he made no such admission, then that an account of them should be taken.—The rule in *Sanderson v. Crouch* was here proceeded on, and the same kind of decree made. His Lordship said he was convinced, that from the manner in which the decree in *Sturt v. Harvey* was expressed, that it was considered as the settled rule in Chancery at that time. The principle is the same as in the other cases, that goods which a wife takes in *autre droit* are not given by the marriage to the husband; but that he, in taking, holds them subject to the trust to which they were subject in the hands of the wife.

14. In the late case of *Clough v. Dixon* (a), where administration had during the coverture been granted to the wife jointly with another person, the husband's estate was held liable for a *devastavit*, which he had committed by placing the fund to the joint account of himself and the co-administrator, who absconded with it after his death, and in the life of the wife surviving, who had been thus excluded by her husband from acquiring a control over the property.

15. It has been before noticed, that the husband when he has not by his own acts made himself responsible, is only liable for his wife's *devastavit* whilst the marriage subsists between them, so that when it determines before a judgment or decree is obtained against them for the demand, his or his wife's death discharges his liability.

(a) 8 Sim. 598; affirmed 3 M. & C. 490.

16. As to what proceedings at law will fix the husband with his wife's *devastavit* after her death, Mr. Roper remarks (a): "There is a peculiarity attending this demand, and the proceedings to recover satisfaction for it, which it is necessary to consider, for the purpose of showing at what period of those proceedings the death of the wife will or will not at law exonerate her husband from answering for her *devastavit*. An action to recover a debt owing by a testator can be brought only against the person standing in relation to the testator as his legal personal representative; that person, in the case now under consideration, is the wife, executrix or administratrix, and her husband is made a party *pro formâ*. The first judgment is, that the debt shall be paid *de bonis testatoris*; it affects only the testator's estate, and creates no personal liability in the husband to satisfy the demand. Upon this judgment the plaintiff may proceed at his election in one of two methods, either by suing a *fiere facias de bonis testatoris* directed to the sheriff, to which if he return *nulla bona*, then upon a suggestion of a *devastavit*, a *scire fieri* will be directed to him to levy the debt *de bonis testatoris*; or if that cannot be done, then to inquire by a jury as to the commission of a *devastavit*; and if it be so found, then to summon the parties to appear in the Court above to show cause why execution *de bonis propriis* should not issue. If the sheriff return to this compound writ *nulla bona*, and a *devastavit* upon the inquest, and the fact of a *devastavit* having been committed be confirmed upon proceedings above; then judgment *de bonis propriis* will be given, and although the wife happen to die after such judgment, and before any proceedings are had under it, yet her husband will remain chargeable, his liability having been fixed by the judgment *de bonis propriis*. (b) The other and more usual mode of proceeding upon the first or original

(a) 1 Rep. H. & W. 202.

603: Eyres v. Coward, 1 Sid. 337:

(b) Kings or Knights v. Hilton,

Obrian v. Ram, 3 Mod. 189.

1 Roll. Abr. 931, pl. 11; Cro. Car.

judgment is, by an action of debt upon it, suggesting a *devastavit*; and which action either may or may not be brought after or without suing any *feri facias* upon the first judgment. (a) If the wife die before judgment be obtained in this action, the husband will be discharged. The whole may be summed up thus: that no proceedings can be had either by action of debt upon a *devastavit*, or by a *scire fieri* inquiry against the husband of an executrix, if she die after judgment against her and her husband *de bonis testatoris*; but that if a general judgment be had against them either upon the *scire fieri* or in the action of debt, and then the wife dies, her husband will be bound, and must answer personally. (b)"

In *Tyler v. Bell* (c), where the husband having become liable, made the wife his executrix, and she possessed assets more than sufficient to satisfy the demands of the next of kin after payment of his debts, it was held that his estate was discharged, and that the next of kin could not sue his administrator *cum testamento annexo*.

- (a) *Wheatley v. Lane*, Sid. 397: (c) 2 M. & C. 89. As to the husband's liability for breaches of trust committed by his wife before marriage, see *Waring v. Williams*, 3 Skelton v. Hawling, 1 Wils. 258: Erving v. Peters, 3 Term Rep. 685. 670: *Mounson v. Bourn*, Cro. Car. Beav. 227. 519.

SECTION II.

OF THE WIFE'S LIABILITY.

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| <p>2. <i>Wife surviving liable where executrix before marriage.</i></p> <p>3. <i>Not where executrix during marriage.</i></p> <p>4. <i>Effect of her consent to the administration.</i></p> | <p>6. <i>Can be sued at law only by creditors.</i></p> <p>7. <i>Remedy for legatees in equity against wife.</i></p> <p>8. <i>Adair v. Shaw.</i></p> <p>9. <i>Opinion of Sir L. Shadwell.</i></p> |
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1. THE husband's liability to answer for his wife's and his own *devastavit*s of assets, which came to their hands in her right as executrix or administratrix, having been considered, her responsibility after his death, for waste of the assets committed before and subsequently to the marriage, is the next subject which presents itself.

2. Where the wife is executrix before the marriage, if she survive her husband, it seems that she will be liable to answer not only for her own wrongful acts committed in the administration previously to the coverture, but even for those of her husband during the continuance of the marriage (a) ; because her title as executrix or administratrix having commenced and become complete before the marriage, it was her own folly to take a husband who would so misconduct himself as to waste her testator's or intestate's assets.

3. But where the wife is executrix or administratrix after marriage, the act of the husband, in obtaining probate or letters of administration in his wife's name, if against or without her consent, and she does not afterwards intermeddle in the administration, is an act from which she may dissent after his death by renunciation, and avoid the consequences

(a) *Bellew v. Scott*, 1 Stra. 440 : 1 Sch. & Lef. 261.

of his misconduct. (a) In allusion to this, the court of Common Pleas in *Stokes v. Porter* (b) said, "that some possession was colourable, yet none in law to charge, &c., as in the instance of a wife executrix who did not intermeddle, &c., and renounced after her husband's death."

4. However, Mr. Roper considers (c) that if the husband procure probate or letters of administration in his wife's name and with her consent, then she surviving him will be personally answerable, upon the insolvency of his estate, for the waste committed by him of her testator's or intestate's assets; because she by her own act and assent having assumed the office of executrix or administratrix, and being the only legal personal representative of the testator or intestate (which distinguishes this case from that before mentioned, of the husband's discharge by her death from her *devastavit*, he being neither executor nor administrator), became liable with her husband for every act relating to it; and an action or suit lay against both of them, and upon his death the right of action survived against her.

5. Mr. Roper cites as authorities an anonymous case in *Croke* (d) (a case of trespass, where the husband died after verdict obtained against himself and wife), where the Court said, it was clear that if the husband survived his wife he was chargeable, and the reason was the same for charging her when she was the survivor; and *Rigley v. Lee* (e), where a verdict in ejectment having been obtained against husband and wife, he died before the day *in banco*; and the Court held that there was no abatement, because the action was in the nature of trespass, and the wife was charged for her own fact; therefore, that the action continued against her, and the judgment should be entered against her sole.

6. But at law these liabilities can be enforced only at the

(a) Wentw. Off. Ex. chap. 17, p. 206.

(b) Dyer 166 b.

(c) 1 Rop. H. & W. 197.

(d) Cro. Car. 509.

(e) Cro. Jac. 356: and see *Horsley v. Daniel*, 2 Lev. 161.

suit of creditors, because legatees cannot maintain an action against an executor or administrator (a), their relief being only in a Court of Equity or in the Ecclesiastical Court.

7. Upon the right of legatees under these circumstances to relief in equity, Mr. Roper observes(b): "Although legatees be without remedy in Courts of Law, yet Courts of Equity will interfere in their behalf against the husband of a feme-executrix or administratrix, who has applied the assets to his own use; but whether these Courts will assist them against the surviving wife, to make her responsible for the *devastavit* of her husband or of herself during the marriage, is not, I believe, settled by any express adjudication. The answer given to legatees in Courts of Law is, we will not interfere for you; there is a more competent jurisdiction for the administration of assets, a Court of Equity, to which we refer you. This is the reason why a legatee cannot maintain an action at law. It is not because he has no right nor title; but his right or title is referred to another court, which from its constitution and forms can more effectually administer justice in a case which is connected with the account and administration of assets, than the forms of a Court of common law allow. The objection, therefore, that because a legatee cannot recover against the surviving wife at law, he ought to have no relief in equity, is untenable. Upon what principle of justice, then, does the claim of a legatee stand to compel the surviving wife to answer his demand on account of a *devastavit* committed either by herself or her husband during the marriage? It is founded upon the equity of the legatee to be paid out of assets belonging to the testator, which, in breach of the trust that the law confided to the wife, have been either wasted by her, the sole and proper legal personal representative, or by her husband, whom she, by her own act and consent in taking that office, empowered to commit the *devastavit*. Since at law, there-

(a) *Deekes v. Strutt*, 5 Term Rep. 690.

(b) 1 Rop. H. & W. 199.

fore, as it seems, the right of action by creditors survived against her, so in equity, it would also seem, the equitable demand of the legatee also survived."

8. Lord Redesdale expressed a strong opinion in favour of legatees in the case of *Adair v. Shaw* (a), which has been before referred to. In that case, Crymble the elder, by a sixth codicil, bequeathed his residuary personal estate to trustees, to be invested in the purchase of lands, to be settled to such uses and upon such trusts as certain estates in the counties of Antrim and Carrickfergus were expressed by the codicil to have been devised and limited by his will to Charles Crymble the younger and his issue in tail male, but in fact to Charles for life, and to his first and other son and sons in succession in tail male; with remainder in like manner to William Crymble and his sons; with remainder to Charles Adair for life, and to his sons successively in tail male, &c. The trustees and executors named in the will declined to act, and administration *pendente lite* was granted to the defendant Mrs. Shaw, mother of the first tenant for life, and then the wife of F. Shaw. Prior to this grant, a suit had been instituted in the Ecclesiastical Court for administration, and a bill had been filed in equity to preserve the property in the mean time. These suits were discontinued, and a compromise made between Shaw and wife and Crymble the younger; and they paid to him the whole residuary personal estate. By the deaths of Charles and William Crymble without heritable issue, the right to the remainder in the lands to be purchased with the residue became vested in Charles Adair for life (who also became the testator's legal personal representative), with remainder to his eldest son Thomas Adair in tail male. They filed a bill against Shaw and wife and others, to have the residue invested under the will and codicil, he and they having compromised a suit which had been commenced by him for the same purpose.

(a) 1 Sch. & Lef. 243.

Mr. and Mrs. Shaw admitted that she had received assets to the amount of 10,000*l.* and that she had paid to Charles Crymble the clear residue, under the impression that he was intitled to it, she having been advised, that if it had been laid out in the purchase of lands he would have had complete dominion over it. Her husband F. Shaw then died, and the suit was revived against his executors, charging him with a *devastavit*, and that his assets were liable to the demand in respect of it; but his executors insisted that Mrs. Shaw alone administered, and that her husband being only liable to her debts during the marriage, and no judgment or decree had been obtained against him during its continuance, his assets were not liable. Lord Redesdale held that Mrs. Shaw in paying legacies and disposing of the residue, exceeded her power under the letters of administration *pendente lite*; they merely authorising her to collect the assets and to pay the debts: that she was responsible, and her husband's assets also, to this extent, viz. she for the whole, and her husband's assets for whatever came to the hands of himself or wife during the marriage, except so far as he left assets in specie at his death which might have come to his wife's hands, and that for what might have been so left he would not be answerable, but his wife only; that the personal demand against the surviving wife was a necessary consequence of the acts in which she concurred, and that at law she would be responsible to the creditors of her testator, although not to the residuary legatees, for the reason before mentioned. By the decree it was declared (amongst other matters, after giving the usual directions), that whatever assets of the testator Crymble came to Mrs. Shaw's hands after her husband's death should be answered by her; and that whatever came to his executors' hands should be answered by them; and that if any of the original testator's assets remained in specie in the husband's hands at his death, which came to the possession of his executors, they were to account for them, answering personally for their own receipts, and for

their testator's receipts out of his assets; and further directions were reserved in regard to Mrs. Shaw, if her husband's personal estate should be insufficient to pay what was due from it. The result was, that Mr. Shaw's assets were greatly deficient to pay what was found due from him on account of his and his wife's receipts of the testator's estate. The residuary legatees therefore applied to the Court for a personal decree against Mrs. Shaw for payment of the amount of the deficiency; but no order was made upon it, as the plaintiffs seemed disposed not to press their claims against her. On that occasion Lord Redesdale said, that as to creditors the wife would be clearly responsible, and that the inclination of his mind was to hold her responsible in this case also; since, although under the control of her husband, her taking out administration was nevertheless a voluntary act, which she might have refused to have done.

9. However, in the case of *Clough v. Dixon*, which has been before cited (a), Sir L. Shadwell, V. C., considered it very doubtful whether the wife was responsible to the next of kin for her husband's *devastavit*, and, alluding to *Adair v. Shaw*, added, "I do not think that the reasoning of Lord Redesdale is satisfactory, where he says that a married woman, an executrix, would be responsible to the creditors of the testator after the coverture, for a *devastavit* committed by her husband during the coverture."

(a) Page 28, *ant.*

CHAPTER XXIV.

OF THE DISABILITIES OF COVERTURE, AND THE EXCEPTION
TO THEM.

SECTION I

OF THE DISABILITIES OF COVERTURE.

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| <ol style="list-style-type: none"> 1. <i>Disabilities of coverture why created by law.</i> 2. <i>Where deeds by wife are void.</i> 3. } <i>Where deed delivered as es-</i> 4. } <i>crow by wife is void.</i> 5. <i>Husband by disclaimer may give effect to wife's deed.</i> 6. <i>Wife may purchase estate subject to husband's disagreement.</i> 7. <i>But after his death, she or her heirs may disaffirm purchase.</i> 8. <i>What will be confirmation by wife after husband's death.</i> 9. <i>If husband disagrees, he may recover purchase-money.</i> 10. <i>Effect of bond to wife where husband disagrees.</i> | <ol style="list-style-type: none"> 11. <i>Wife's will void.</i> 12. <i>Exceptions.</i> 13. <i>Wife without husband's concurrence unable to contract.</i> 15. <i>Or receive money.</i> 16. <i>But may act as husband's agent or attorney.</i> 18. <i>Unable to release debts, or give or negotiate security.</i> 21. <i>Unless as husband's agent.</i> 22. <i>Presumption that she is husband's agent.</i> 24. <i>Unable to act as executrix without husband's concurrence.</i> 25. <i>Cannot in general be witness for or against husband.</i> 26. <i>Exceptions.</i> |
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1. THE disabilities to which the wife becomes subject on marriage are created by policy of law, for two reasons; first, to prevent, so far as is possible, the regard which the wife is supposed to entertain for her husband, and his influence over her, from stripping her of all her property during the marriage; and, secondly, to exempt the husband from liability in respect of her acts and engagements to which he was not privy and consenting; for if she, who of the two is reasonably presumed to be the most exposed to imposition,

were allowed to bind the husband by her *sole* acts, the consequences might prove ruinous to both of them and their family.

2. Accordingly, it is a general rule, the exceptions to which will be noticed in the ensuing section, that the deeds of married women are void. (*a*)

3. If, therefore, a married woman execute and deliver a deed to a person as an escrow, and the husband die, and then the grantee perform the condition, upon which the person to whom the deed was delivered gives it to the grantee as the woman's deed, it is void (*b*) ; because the instrument receives its inception from the first delivery, and its completion upon performance of the condition ; and the second delivery is merely the execution and consummation of the first (*c*), so that the grantor or donor being under the disability of coverture at the time of the first delivery of the deed, the subsequent death of the husband, before the compliance of the grantee or donee with the terms of it, will not remedy the original defect.

4. But if the wife had been single at the period of the first delivery, and afterwards, but before the grantee or donee complied with the conditions upon which it was to be his deed, had taken a husband, the marriage would not defeat the deed ; for the instrument, commencing in effect from the first delivery, amounted by relation to the deed of a feme sole. (*d*)

5. However, the husband may, by his disclaimer, give effect to a deed executed by his wife. (*e*)

6. And the wife is a person by law enabled either to purchase or accept an estate ; which, subject to the approval or disagreement of her husband, vests in her in the mean time. (*f*)

(*a*) Perk. sect. 6 : 2 Wils. 3 : 2
Saund. 213 : 2 Freem. 218.

(*b*) Perk. sect. 11.

(*c*) 5 Rep. 846 : 1 Ves. Jun. 275.

(*d*) Perk. sect. 9.

(*e*) Rycroft v. Christie, 3 Beav.
240.

(*f*) Co. Litt. 3 a.

7. However, after her husband's death, she, if she survive him, or if she make no election and die before him, her heirs, may disaffirm the purchase. (a)

8. If the wife, after her husband's death, enter upon the estate made to her during the marriage, and take the profits, that will be an assent and confirmation. (b)

9. If the wife purchase an estate without her husband's knowledge, and he afterwards disagree to it, he may recover the purchase-money from the vendor in an action of trover. (c)

10. It is laid down, that if a bond be made to the wife, and the husband disagrees, the obligor may plead *non est factum*; for, by the refusal, the bond lost its force, and became no deed. (d)

11. The wife is also disabled by the common law from making a will. By sec. 14. of the old Will Act (e), it is provided that wills or testaments made by women covert shall not be good or effectual in law. This clause, as Mr. Jarman observes (f), did not create any disability that was unknown to the common law: but seems to have been dictated by an apprehension that the general terms of the prior act of the 32nd year of the same reign might possibly have had the effect of removing pre-existing disabilities, according to the construction given to the nearly contemporary statute of Jointures. (g) By the present Will Act (h), it is provided that no will made by any married woman shall be valid, except such a will as she might have made before the passing of the act.

12. Where, however, the husband has been banished for life by act of Parliament, the wife may dispose by will of her property; for, as he is civilly defunct, she is restored to

(a) Co. Litt. 3a.

(b) 3 Rep. 26 a.

(c) Granby v. Allen, 1 Ld. Raym. 224; Comberb. 450.

(d) Whelpdale's case, 5 Rep. 119b.

(e) 34 & 35 Hen. 8. c. 5, explanatory of the 32 Hen. 8. c. 1.

(f) 1 Jar. Wills, 28.

(g) 27 Hen. 8. c. 4.

(h) 1 Vic. c. 26. sec. 8.

the powers of a feme sole. (a) And where a felon is transported for a definite term of years, his marital rights (and therefore, it should seem, his wife's conjugal disabilities) are suspended for that period. (b)

The other exceptions to the rule that the will of a married woman is void, will be noticed in the ensuing section.

13. The wife is also, with certain exceptions, which will be hereafter noticed (c), disabled by law from contracting so as to bind her person; nor can she, with such exceptions, sue or be impleaded without him. (d)

14. In what cases the husband will be liable for contracts or debts made or incurred by his wife, has been already considered. (e)

15. With the same view, namely, for the husband's protection, the law incapacitates the wife to receive or dispose of money without his concurrence. Accordingly, payment of a legacy bequeathed to her generally, and not given to her separate use, will be a void payment as to her husband (f); and the law is the same in regard to rent, &c. (g)

16. But the wife may act as her husband's agent or attorney. If, therefore, he authorise her to receive and pay money, or if she be accustomed so to do with his permission (which is an implied authority), he will be bound by such her acts. (h)

17. So, also, if the husband desire money to be lent to

(a) *Portland v. Prodgers*, 2 Vern. 104.

(b) 1 Jar. Wills, 34.

(c) Sect. 6, *infra*.

(d) *Marshall v. Rutton*, 8 T. R. 545.

(e) Chap. 22, *supra*.

(f) *Palmer v. Trevor*, 1 Vern. 261; *Moses v. Levi*, 3 Y. & C. Eq. Ex. 359; *Norris v. Hemingway*, 1 Hagg. Eccl. R. 5.

(g) 2 Wils. 3: *Tracy v. Dutton*, Palm. 206.

(h) Palm. 206: *Seaborne v. Blackstone*, 2 Freem. 178; *Wynne v. Wynne*, 4 Man. & G. 253. On a plea of payment to the wife, her authority to receive should be stated, *Offley v. Clay*, 2 Man. & G. 173; 9 Jur. 1203.

his wife, payment of it to her will bind him ; and he will be liable to make satisfaction to the creditor in an action of assumpsit (*a*) ; because this amounts to an express contract by the husband to pay the money, and an assent that the wife should receive it.

18. The law, for the like reasons, disables the wife, without her husband, to suspend, alter, or release any debt made payable to herself generally, or to give, indorse, or assign a promissory note or other security.

19. Thus, in *Rawlinson v. Stone* (*b*), Dennison, J., said, that if a note of hand were made payable to a single woman, who afterwards married, she could not indorse and assign it ; and he cited a case of *Connor v. Martin* (*c*), of which he had taken a note : it was an action by the indorsee of a promissory note payable to Susan Connor, or her order, and given to her before marriage, and which, after marriage, she indorsed to the plaintiff. The defendant pleaded that Susan was married at the time of making the indorsement. The plaintiff demurred, and the question was whether the plaintiff could maintain the action upon the note indorsed by a married woman ? The whole Court were of opinion that the wife could not assign the note, because by the act of law it became the sole right and property of the husband.

20. And in *Brown v. Benson* (*a*), the defendant and another person gave a bond to the plaintiff (the husband) conditioned to pay to his wife an annuity of 26*l.* quarterly for eleven years. The plaintiff being in embarrassed circumstances, left this country shortly after the date of the bond ; and the obligors having advanced on his account money to the amount of 25*l.* 5*s.*, they, during the husband's absence, agreed with his wife, that she should give up five years' annuity, and consider it as paid for that period in satisfaction

(*a*) *Stephenson v. Hardy*, 3 Wils. 388.

(*c*) In C. P. Easter, 8 Geo. 1.

(*d*) 3 East, 331.

(*b*) 3 Wils. Rep. 5.

of the advancements; and she signed a receipt accordingly. The jury found that the advancements were made for a debt of the plaintiff, and for his benefit. The question was, whether this agreement between the wife and the obligors was binding upon the husband? and the Court held in the negative; because the bond had no further operation than to give the wife an authority to receive the payments as they became due, which she could not transfer nor anticipate.

21. If, however, the wife be accustomed to sign instruments for her husband, or with his permission, it seems that the law (as before mentioned) will presume that she acted as his agent in other similar cases; and then such acts will bind him. (*a*)

22. But the presumption will not be raised by the fact that the money has been applied in payment of the husband's debts. (*b*)

23. It need scarcely be noticed that where the husband's authority is distinctly proved, the wife's acts in signing instruments will bind him. (*c*)

24. Upon the same principle of protection to the husband and wife, she is not permitted, as we have seen (*d*), to take upon herself the office and responsibility of an executrix or administratrix without her husband's concurrence.

25. It may be here observed that the wife is in general debarred from being a witness for or against her husband at law (*e*); and the same general rule prevails in equity. (*f*)

26. There are, however, exceptions to this rule at law, where,

(*a*) *Bowyer v. Peake*, 2 Freem. 215: see *Cotes v. Davis*, 1 Campb. 485: *Barlow v. Bishop*, 1 East, 484: *Scarpellini v. Acheson*, 7 Q. B. 864; 9 Jur. 828.

(*b*) *Goldstone v. Toovey*, 6 Bing. N. C. 99.

(*c*) *Prestwick v. Marshall*, 7 Bing. 765; 5 Moo. & P. 573: 4 Car. &

P. 594: *Prince v. Brunatte*, 1 Bing. N. C. 435; 3 Dowl. P. C. 382: *Lindus v. Bradwell*, 12 Jur. 230.

(*d*) *Ant*, vol. 1. p. 40.

(*e*) See 1 Phillips on Evidence, chap. 5. sect. 3. 9th ed.

(*f*) *Le Texier v. the Margrave of Anspach*, 5 Ves. 322; 15 Ves. 169: *Barron v. Grillard*, 3 V. & B. 165.

from the nature of the inquiry, the nature of the information to be expected is peculiarly within the knowledge of the wife, and where to exclude such evidence would occasion insecurity to that relation in society which it is the object of the rule to protect. And in equity the wife's affidavits may in some cases be used against the husband.

SECTION II.

BY WHAT MODES THE WIFE IS ALLOWED TO DISPOSE OF HER PROPERTY.

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| <hr/> 2. <i>Wife's conveyance under old law by fine or recovery.</i>
4. <i>Contingent interests barred by fine.</i>
5. <i>Declaration of uses by wife alone void.</i>
6. <i>By husband alone whether valid.</i>
7. <i>Where declarations of uses by husband and wife different.</i>
8. <i>Effect of fine by wife alone.</i>
9. <i>Where wife permitted to levy fine as feme sole.</i>
10. <i>Wife now enabled by 3 & 4 W. 4. c. 74. to convey by deed.</i>
11. <i>But husband must concur, and deed must be acknowledged.</i>
12. <i>Where act applies to copyholds.</i>
13. <i>Wife before acknowledgement must be separately examined.</i>
14. <i>Where husband's concurrence dispensed with.</i>
17. <i>Solemnities on purchase of wife's estate by authority of parliament.</i>
18. <i>Wife may convey contingent and future interests, and rights of entry.</i>
19. <i>And may disclaim by deed.</i>
20. <i>Her conveyances by special custom.</i>
21. <i>Wife with husband may surrender copyholds.</i>
22. <i>Or alone with husband's assent by special custom.</i> | 23. <i>Presumption of husband's assent.</i>
24. <i>Where custom requires husband's assent to be expressed on the surrender.</i>
25. <i>Custom to surrender without husband's assent bad.</i>
26. <i>Compton v. Collinson.</i>
27. <i>Mr. Jacob's remarks thereon.</i>
28. <i>Where husband's concurrence dispensed with under 3 & 4 W. 4. c. 74.</i>
29. <i>Whether wife can appoint attorney to surrender.</i>
30. <i>Whether surrender to use of wife's will necessary.</i>
31. <i>Wife's separate examination how taken.</i>
32. <i>Surrenders of equitable estates valid under 3 & 4 W. 4. c. 74.</i>
33. <i>Wife's power of renewing leaseholds under 11 G. 4. & 1 W. 4. c. 65.</i>
34. <i>Unable to dispose of her reversionary personal estate by her consent in court.</i>
35. <i>But her consent sometimes taken to declare her election.</i>
36. <i>May elect to take money to be invested in land, as money.</i>
37. <i>Where lands purchased to be settled upon her in tail.</i>
38. <i>May execute power, or make will by husband's permission.</i> |
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1. THE wife is not wholly precluded from disposing of her real estates during the marriage.

2. Although the old law protected the wife during the coverture, so as to invalidate the alienation of her property by private conveyances, unsupported by any particular custom, yet it permitted her to convey her real estates, whether legal (*a*) or equitable (*b*), by a fine or by a common recovery (*c*), in consequence of the solemnity with which these assurances were attended. By either of these modes of assurance, she had the same power over her property as if she had become a feme sole. (*d*)

3. Fines and recoveries are now abolished (*e*); yet it may still be useful to notice the following points in relation to them.

4. The fine of a married women had the effect of binding her contingent interest by estoppel. (*f*)

5. It was necessary that the declaration of the uses of a fine or recovery levied or suffered by husband and wife should be made by them jointly. If made by the wife alone, it was void. (*g*)

6. But if a declaration of uses was made by the husband alone, either before or after the fine or recovery, the wife's agreement was presumed, unless the contrary appeared by some manifest signs of her dissent; and this presumed assent would give it validity. (*h*) Her dissent might have been evinced by acts *in pais*, as by refusing to join in the declaration of uses executed by her husband (*i*), or by her declaring other uses. But to render the husband's declaration of uses ineffectual, it seems that it was necessary to

(*a*) 1 Roll. Ab. 347.

(*b*) Forrest, 41: Tull v. Owen, 1 Y. & C. Eq. Ex. 19*b*.

(*c*) 10 Co. 43 *a*: Incledon v. Northcote, 3 Atk. 430.

(*d*) Cotterell v. Homer, 13 Sim. 512; 7 Jur. 544.

(*e*) By 3 & 4 W. 4. c. 74.

(*f*) Helps v. Hereford, 2 B. & Ald. 242.

(*g*) Johnson v. Cotton, Skin. 275.

(*h*) Beckwith's case, 2 Co. 56: Lusher v. Banbong, Dy. 290 *a*: Swanton v. Raven, 3 Atk. 105; Gilb. Uses, 40; Owen, 6.

(*i*) Webb v. Worfield, 22 Vin. Ab. 232.

show that she did not agree to it at the time, and therefore her dissent, declared sometime afterwards, and after his death, was not sufficient to avoid it. (a)

7. When the husband and wife made declarations of uses which were entirely different, both were void (b), excepting that the husband's interest was bound by that which he had made. (c) If their declarations of uses differed as to the first limitations, but agreed as to those in remainder, both were void (d), though it has been suggested that the ulterior limitations might take effect as springing uses. (e) If they agreed as to part of the land, they were good as to that part (f); and Mr. Jacob considers (g) that it would perhaps be held by analogy, that if they agree as to the first uses, but differ as to the subsequent limitations, they would be good, so far as they coincide, though this point does not appear to have been decided. (h)

8. The wife was not competent to levy a fine without the concurrence of her husband, and therefore if it appeared by the record of a fine that it was levied by a married woman alone, it was voidable for error in the record, and would not bind her or her heirs. (i) But if she had levied a fine as a feme sole, not disclosing the fact of her coverture on the record, and the fine was not avoided by the husband, it was binding on her and her heirs, as they were estopped from averring against the record, that she was a feme covert. (k) The husband might, however, during the coverture, defeat

(a) Dyer, 290: 3 Atk. 105; see Preston on Conveyancing, vol. 1. p. 314.

(b) 2 Co. 57.

(c) Moor, 196: Gilb. Uses, 40.

(d) 2 Co. 58.

(e) Preston. Conv. vol. 1. 17.

(f) 2 Co. 58.

(g) 1 Rep. H. & W. 141.

(h) See Pres. Conv. 314: Gilb. Uses, by Sugden, 41 n.

(i) 1 Sid. 122: 1 Taunt. 38.

(k) Hob. 225: 2 B. C. C. 388. In *Compton v. Collinson*, 1 H. Bl. 343, it was denied that the fine in this case operates by estoppel, but it was not considered, as Mr. Jacob notices (1 Rep. H. & W. 142 n), that the fine owes its effect to the misstatement on the record, which the wife and her heirs are not at liberty to set right.

the fine thus levied; it was then avoided *in toto*, and the former uses restored.

If the husband was intitled to be tenant by the curtesy, he might also have entered after the wife's death (a); but in this case it is said that the fine was only avoided to the extent of his interest. (b)

9. In some instances married women were, under particular circumstances, permitted to levy fines alone, as if unmarried. In these cases the Court did not make any order to sanction or give validity to the fine, but it was left open to the husband to defeat it. (c)

10. But fines and recoveries were abolished by the 3 & 4 W. 4. c. 74. The 77th section of this act enables the wife in every case, (except where she is tenant in tail, for which provision is made by the 40th section,) by deed to dispose of lands, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate (d) which she alone, or she and her husband in her right, may have in any lands, or in any such money; and also to release or extinguish any power relating to lands or such money.

11. The husband is, however, required to concur in the deed, which must be acknowledged by the wife as therein-after directed. *aff' under § 91. 24 C.P. 205.*

12. The act is not to extend to copyholds where the objects to be effected by the 77th section could previously have been effected by a surrender.

13. Provision is made in ensuing sections of the acts for

(a) Shep. Touch. 7.

(b) 1 Prest. Convey. 255: see Vin. Ab. Fine, T. pl. 4. 10.

(c) Moreau's case, 2 Bl. 1205: Stead v. Izard, 1 N. R. 312: *ex parte* Alney, 1 Taunt. 37: *ex parte* St. George, 8 Taunt. 590: 1 Prest. Convey. 254.

(d) By the first section of the act

the word *estate* is to extend to an estate in equity as well as at law, and also to any interest, charge, lien, and also to any interest, charge, lien, or incumbrance in, upon, or affecting lands at law or in equity, and also to any interest, charge, lien, or incumbrance in, upon, or affecting money subject to be invested in land.

the acknowledgment of the deed by the wife (*a*), who before her acknowledgment is taken is to be separately examined as to her consent to it, without which it will be void. (*b*)

14. The Court of Common Pleas is authorised to dispense with the husband's concurrence in certain cases. (*c*) This has been done where he was a lunatic (*d*), where he had absconded and his residence was unknown to his wife (*e*), where he had absconded after committing an act of bankruptcy (*f*), where he had resided for more than twenty years with another woman (*g*), and where the parties were living separate by mutual consent, and the husband had refused to join unless part of the purchase-money was paid to him. (*h*)

15. But the husband's concurrence will not be dispensed with where his absence is only temporary. (*i*) And where the husband was abroad, and had not been heard of for two years, it being stated by the wife in her affidavit that she believed he would never return, the application was refused. (*k*)

(*a*) Sect. 79—89 : see as to these provisions, and the decisions which have been made thereon, App. No. 10.

(*b*) Sect. 80.

(*c*) Sect. 91 ; as to the form of the rule to dispense with the husband's concurrence, see *ex parte* Duffill, 5 Man. & G. 378 ; 6 Scott, N. R. 63. An affidavit is required to be made by the wife, see *re* Bruce, 3 Scott, N. R. 593 ; 9 Dowl. P. C. 840 : *re* Williams, 1 Man. & G. 881 ; 2 Scott, N. R. 120 ; 9 Dowl. P. C. 72 : *re* Horsfall, 3 Man. & G. 132 ; 10 Law J. N. S. C. P. 292 : *re* Noy, 7 Scott, N. R. 434. As to what affidavit is sufficient when the wife is residing abroad, see in *re* Schiff, 1 Dowl. & L. P. C. 911.

(*d*) *Ex parte* Thomas, 4 Moo. &

S. 331 : see in *re* Turner, 3 C. B. 166. But where the wife was living apart from the husband, who was in a state of mind which rendered it difficult to procure his concurrence, the court required that previous application should be made to him. *Mirfin to —*, 4 Man. & G. 635 ; S. C., *re* Murphy, 5 Scott, N. R. 166.

(*e*) *Ex parte* Shuttleworth, 4 Moo. & S. 331 n ; *ex parte* Stone, 9 Dowl. P. C. 843 : Anon. 2 Jur. 945.

(*f*) *Ex parte* Gill, 1 Bing. N. C. 168.

(*g*) *Ex parte* Shirley, 5 Bing. N. C. 226 ; 7 Scott, 174 ; 7 Dowl. P. C. 250 ; 3 Jur. 124.

(*h*) In *re* Woodcock, 1 C. B. 437.

(*i*) *Ex parte* Gilmore, 3 C. B. 967.

(*k*) In *re* Smith, 16 Law J. N. S. C. P. 168.

16. In these cases the Court gives the parties general authority to convey, and will not sanction particular forms of conveyance. (a)

17. It seems that where a statute authorises the purchase of lands in which the wife has an interest, and the Court has power to distribute the money among the parties intitled, the exercise of such authority by the Court is in lieu of the solemnities ordinarily required for the conveyance of the wife's real property on a payment of her money out of Court. (b)

18. It is questionable whether a married woman was enabled to convey her contingent interests under the 7 & 8 Vic. c. 76. (c) But this act was repealed by the 8 & 9 Vic. c. 106, which enables married women. by deed executed according to the provisions of the fines and recoveries act, to dispose of contingent, executory, and future interests, and possibilities coupled with an interest, and also rights of entry. (d)

19. It has been considered doubtful whether the fines and recoveries act enabled the wife, if she was a trustee, to disclaim. (e) But now, by the 8 & 9 Vic. c. 106 (f), an estate or interest in any tenements or hereditaments in Englan may be disclaimed by a married woman, by deed executed according to the provisions of the fines and recoveries act.

20. By immemorial custom prevailing in particular places, a bargain and sale, &c. by the husband and wife, when she is examined according to such custom, will bind her and those claiming under her ; such conveyances were equivalent to a

(a) In re Woodall, 3 C. B. 639.

(d) Sect. 6.

(b) *Ex parte* Ellison, in re Trinity House Corporation Act, 2 Y. & C. Eq. Ex. 528.

(e) See Cruise's Digest, 4th ed. by White, vol. 7, p. 13, and vol. 4. p. 19.

(c) See Neale on the Real Property Acts of 1845, p. 50.

(f) Sect. 7.

fine (a), and are protected by an act of parliament passed in 34 Hen. 8. (b)

21. A surrender by the husband and wife of copyholds when she is duly examined will bind her and her heirs, (c)

22. It seems that a special custom will authorise a surrender by the wife alone with the assent of the husband. (d)

23. In *Seaman v. Mawe* (e), although there was no such special custom, a surrender by the wife alone to the use of her husband was supported, the wife having been separately examined, and the husband's assent being presumed from his presence in Court and immediate admission.

24. It seems that a custom requiring that the husband's consent should be expressed on the surrender would be good, and that where the custom requires the husband's consent, it will not be restricted to cases where he has no interest in the estate. (f)

25. But a custom for the wife to dispose of her copyholds by surrender without the husband's assent is bad. (g)

26. In *Compton v. Collinson* (h), where the husband and wife were living apart under articles of separation, the husband covenanted to join in all necessary conveyances, and in surrendering certain copyholds as the wife should appoint. It was held that the wife might alone surrender the copyholds, and that without a special custom to enable her to do so; for that the wife was tenant, and not the husband, and that the estate could be forfeited or surrendered by her acts only, and not by his.

27. But, as Mr. Jacob remarks (i), the judgment in this case was founded partly on the opinion, since exploded, that

(a) 2 Inst. 673 : Com. Dig. B. & F. G. 4; see also, as to the custom of London in this respect, Bohun's *Privilegia Londini*, 241, 3d ed.

(b) Chap. 22.

(c) Dyer, 363 b.

(d) *Taylor v. Phillips*, 1 Ves. Sen. 229 : 1 Watk. Cop. 64 : Gilb. Ten. 322.

(e) 3 Bing. 378 ; 11 Moo. 243.

(f) *Doe v. Shelton*, 8 A. & E. 265 ; 4 Nev. & M. 857.

(g) *Stevens v. Tyrrell*, 2 Wils. 1.

(h) 1 H. Bl. 334.

(i) 1 Rep. H. & W. 142 n.

a feme covert might, after articles of separation, be considered at law as standing in the situation of a feme sole, and partly on the ground that a surrender by the wife alone might bind her and her heirs by analogy to the operation of her fine, an analogy disclaimed in other cases. (a)

28. Now, however, by the 3 & 4 W. c. 74 (b), the husband's concurrence will, in certain cases, be dispensed with.

29. The wife cannot appoint an attorney to surrender her copyholds without a custom, and it seems doubtful whether she could do so even by virtue of a custom. (c)

30. Where by custom the husband and wife may surrender to the use of her will, the wife being separately examined, her will, without a previous surrender, will not be effectual. The surrender not being formal in this case, was not dispensed with by the 55 Geo. 3, c. 192. (d) This statute has been repealed by the late will act (e), which has dispensed with a surrender to the use of a will. But it is presumed that the same construction will be given to this act, as to the necessity of a surrender to the use of a will of a married woman, as to the repealed act.

31. The separate examination of the wife for the purpose of surrendering may by custom be taken before two of the tenants of the manor out of Court. (f)

32. By the fines and recoveries act (g), surrenders by the husband and wife of equitable estates in copyholds, where she is separately examined, are made as binding upon her as if the estates were legal, and previous surrenders of a similar nature are declared to be valid.

33. The 11 G. 4 & 1 W. 4, c. 65 (h) (which has repealed

(a) 2 Wils. 2; 1 Ves. Sen. 230.

(e) 7 W. 4. & 1 Vic. c. 26.

(b) Sect. 91. See p. 48, *antè*; and
ex parte Shirley, there cited.

(f) *Driver v. Thompson*, 4 Taunt.
294.

(c) *Graham v. Jackson*, Q. B.
811; 14 Law J. N. S. Q. B. 129; 9
Jur. 275.

(g) 3 & 4 W. 4. c. 74. sect. 90.

(h) Sect. 12.

(d) *Doe d. Nethercole v. Bartle*,
5 B. & Ald. 492.

a former statute which contained similar provisions (a)), has removed the disability of coverture in instances when the wife is seised or possessed of leasehold property for lives or for years, so as to enable her, or any other person on her behalf, to surrender the old and take new leases. It is enacted by the statute, that in all cases where a married woman was or should become intitled to, or interested in, any lease or leases for life or lives, or for years absolutely determinable upon a life or lives, she, or any person or persons on her behalf, may apply to the Courts of Chancery, or to the other Courts of Equity in England, or of Great Session of the Principality of Wales, by petition or motion; and that, by the order and direction of any of those Courts, she, or any person to be appointed in her stead by the Courts, may by deed surrender such lease or leases, and accept and take, in the name and for the benefit of the married woman, a new lease or leases during such number of lives, or for such number of years determinable upon lives, or for such number of years as were mentioned in the lease or leases surrendered at the making thereof respectively, or otherwise as those Courts should direct. And the act declares that the fines for renewal and the incidental charges shall, unless otherwise paid or secured, be, together with interest, a charge upon the leasehold premises, for the use and benefit of the persons advancing the same (b); and that the renewed leases shall operate and be to the same uses, and be liable to the same trusts, charges, incumbrances, dispositions, devises, and conditions as the surrendered leases. (c)

34. We have seen that the wife's consent will not be allowed to be taken in equity for the disposal of her reversionary personal estate by analogy to the effect which a fine formerly had at law. (d)

35. However, besides its admission for the purpose of waiving her equitable right to a provision out of her choses

(a) 29 Geo. 2. c. 31.

(c) Sect. 15.

(b) Sect. 14.

(d) Vol. I. p. 92.

in action, which has been already considered (*a*), her consent in Court has sometimes a further effect, as in cases where it has been taken for the purpose of declaring her election. (*b*)

36. Where money is given on trust to be laid out in purchasing land, to be conveyed to a feme covert, she may, on an examination in Court, or before commissioners, elect to take it as money. (*c*)

37. If the land, when purchased, is to be settled upon her in tail, her election was formerly made by a like examination upon a petition under the statute 39 & 40 Geo. 3. c. 56. But this act was repealed by the 7 G. 4. c. 45, which (except as to proceedings commenced before Jan. 1st, 1834) has been also repealed by the late act for the abolition of fines and recoveries. (*d*)

38. The subject of the execution of powers by married women, and of the validity of wills made by the wife where she is executrix, or by her husband's permission, will be considered in the three ensuing sections.

(*a*) Chap. 7. *antè*.

71 : Binford v. Bawden, 1 Ves. Jun.

(*b*) As to the wife's election in a suit, see Appendix No. 7.

512.

(*d*) 3 & 4 W. 4. c. 74, sect. 70.

(*c*) Pearson v. Brereton, 3 Atk.

SECTION III.

OF THE EXECUTION OF POWERS BY MARRIED WOMEN.

Power.
See Ch 614;

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| <p>2. <i>Wife may execute mere authority.</i></p> <p>3. <i>Gift to wife upon condition to sell or convey.</i></p> <p>4. <i>May execute powers coupled with an interest.</i></p> <p>8. <i>Power not affected by subsequent marriage.</i></p> <p>9. <i>Appointment good though wife not expressly empowered to appoint during coverture.</i></p> <p>10. <i>Power to woman "being sole," not exercisable during coverture.</i></p> <p>11. <i>Where power confined to particular coverture.</i></p> <p>12. <i>Effect of agreement between husband and wife that she shall dispose of her real estates.</i></p> <p>13. <i>Mr. Roper's remarks.</i></p> <p>14. <i>Effect where such agreement after marriage.</i></p> | <p>19. <i>Where wife takes legal fee with power.</i></p> <p>22. <i>Specific performance of wife's agreement to execute power compelled.</i></p> <p>23. <i>Wife's will under power must be proved.</i></p> <p>24. <i>Practice as to probate: Mr. Jacob's remarks.</i></p> <p>25. <i>Where probate has been refused.</i></p> <p>29. <i>Probate now granted wherever power alleged, semble.</i></p> <p>30. <i>Equity, if necessary, will dispense with probate, semble.</i></p> <p>31. <i>Whether power properly created not to be decided by ecclesiastical court.</i></p> <p>32. <i>But its decision as to testamentary nature of instrument conclusive.</i></p> <p>33. <i>Solemnities required to execution of powers.</i></p> <p>34. <i>Effect of new will act.</i></p> |
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1. It seems to be a natural deduction from the principles upon which the disabilities of coverture are founded, that those cases must be excepted out of the general rule in which the interests of the husband and wife are not in the least affected by her separate acts.

2. She may therefore execute a mere authority, whether it be given before or after marriage; for that has no operation upon any interests belonging either to herself or her husband, and she is no more than the instrument of another

person; so that a power given to her to convey another's estate may be executed by her without her husband's concurrence, and even in his favour. (a) In the exercise of such authority, the wife, as a feme sole, may do every necessary act; for whatever she is obliged to do will be considered, not as her own, but as the acts of her principal.

3. So, if land be given to a woman whilst single, who afterwards marries, or during her marriage, upon condition to sell or to convey them to another person, she alone may perform the condition. (b)

4. As to the execution by the wife of powers coupled with an interest, it is observed by Sir E. Sugden (c), that when we consider that a power not simply collateral gives the complete dominion over the estate to the extent of the power, we may perhaps incline to think that a married woman ought not to have been permitted, in opposition to the rule of law, to divest herself of any estate or interest by the mere execution of a writing without a fine or recovery, although certainly there is no objection to her executing a power simply collateral, which distinction appears to have been adopted by Chief Justice Bridgeman. It, however, has long been firmly settled, that a married woman may execute a power, whether appendant, in gross, or simply collateral, and as well over a copyhold as a freehold estate. (d)

5. Accordingly, if under a deed or will the wife take as tenant for life, with a general power of appointing the fee, she may convey the estate by an execution of the power, the appointee taking the estate under the deed or will. (e)

6. So, if the wife be tenant for life, with remainder to such uses as she shall appoint, and in default of appointment to herself in fee, she alone may, by appointment, defeat her own remainder, although she cannot, by an instrument inde-

(a) Co. Litt. 187 b; 52 a.

(d) See the cases cited in 1 Sug.

(b) 2 Roll. Rep. 68: Br. Cui in
vita, pl. 15: and Dev. pl. 12.

Pow. 181, 7th ed.

(c) 1 Sug. Pow. 180, 7th ed.

(e) Daniel v. Upton, Noy's Rep.
80: Sir W. Jones, 137: 1 P. W. 149.

pendent of her power, convey away her remainder without the concurrence of her husband, formerly in a fine or recovery (*a*), but now in a deed executed as required by the late fines and recoveries act. (*b*)

7. Upon the same principle, if she be tenant for life, with a power of leasing, she alone may exercise the power (*c*); but she cannot without a statute deed grant such a lease or leases, if she have not resort to the execution of her power.

8. When a power is given to an unmarried woman, who afterwards marries, or to a married woman who survives her husband, and marries again: in all such cases she may execute the power, and the concurrence of her husband is not necessary. (*d*)

9. And the appointment will be good, although the wife is not expressly empowered to appoint "during coverture." (*e*)

10. But a power given expressly to a woman "being sole," cannot be exercised by her during coverture. (*f*)

11. And where a power is confined to a particular coverture, it can of course only be executed during such coverture. (*g*)

12. It was unsettled, previously to the case of *Wright v. Cadogan* (*h*) (finally determined in the House of Lords), and that of *Rippon v. Dawding* (*i*), whether the husband and wife by mere agreement before, and in contemplation

(*a*) 2 Ves. Sen. 191.

(*b*) 3 & 4 W. 4. c. 74, sect. 40 & 77. The powers of disposition given to the wife over her real estate by this act, are not to interfere with the exercise of any power which, independently of the act, might be vested in her, except so far as the power may have been suspended or extinguished by any disposition under the act, see sect. 78.

(*c*) See 2 Com. Rep. 496.

(*d*) Ibid. p. 182.

(*e*) *Doe d. Bloomfield v. Eyre*, 3 C. B. 557; 16 Law J. N. S. C. P. 64; 10 Jur. 1084.

(*f*) *The Marquis of Antrim v. the Duke of Buckingham*, 1 Eq. Ca. Abr. 343, pl. 4; 1 Ch. Ca. 17; 2 Freem. 168, cited from the Registrar's Book, B. 1662, fo. 377, in *Bridgman's Judgments*, by Bannister, p. 617.

(*g*) *Morris v. Howes*, 4 Hare, 599; 16 Law J. N. S. Chan. 121; 9 Jur. 966; 2 Eq. R. 299; affirmed on appeal, 10 Jur. 955.

(*h*) 2 Eden, 239; 1 Bro. Parl. Ca. 486.

(*i*) *Ambl.* 565.

of marriage, that she might dispose of her real estate by deed or will during the coverture, could enable her to defeat the right of her heir, after her death, by either of those instruments, since by descent of the legal estate he acquired a complete title at law. And it was doubted whether a Court of Equity could upon any principle affect the conscience of the heir, and oblige him to perform the agreement, since both the deed of a married woman without a fine, and her will, were void instruments from the disability of coverture, and the heir was not a party to the contract. Lord Hardwicke expressed his doubts upon the subject in *Peacock v. Monk* (a), but the two cases before referred to have removed all uncertainty upon the subject, in determining that a Court of Equity will consider the heir as a trustee, and oblige him to make a conveyance to the party in favour of whom the wife appointed the property.

13. Mr. Roper remarks (b), that the grounds upon which such an agreement is binding upon the heir appear to be, that the agreement having been made before marriage, at a period when the wife was able to contract; and as it clearly appears to have been the intention of the parties that the wife should reserve to herself a power to dispose of her own lands during the coverture, she, therefore, and the persons claiming under her appointment, have a right to the interposition of a Court of Equity to give full effect to the marriage agreement, and to remove any obstacles which, in point of form, or otherwise, invalidated the appointment at law; the more especially, since the wife might have obliged her husband to concur in a fine and settlement of the estates pursuant to his engagement, which a Court of Equity, according to its well-known practice, will consider to have been performed. (c)

(a) 2 Ves. Sen. 191: *Bramhall v. Hall*, Ambl. 467; 2 Eden. 220: see 2 Bro. C. C. 544: 2 T. R. 695: *George v. —*, Ambl. 627.

(b) 2 Rop. H. & W. 178.

(c) See *Power v. Bailey*, 1 Ball & Beat. 249.

14. Such, then, being the rule of Equity in regard to the heir, upon an agreement between husband and wife before marriage, that she shall have a disposing power over her real estates when no conveyance of them to trustees is made for the purpose, Mr. Roper inquires whether the heir will be equally bound by such an agreement made after the marriage.

In answer to this question, he observes, that the before-mentioned principle does not equally apply to an agreement after marriage as to one entered into before marriage, since in the former case the wife is disabled from entering into any contract in regard to her real property, either to bind herself or heir, and the husband's agreement can only be obligatory upon himself to the extent of his interest in the estate; so that the agreement in the present instance cannot, as he presumes, bind the wife's heir, and convert him into a trustee of the legal estate, which he takes by descent, for the appointees of the wife.

15. In *Dillon v. Grace* (a), Lord Redesdale marks the distinction between the two cases in these words: "In *Wright v. Englefield* (b), and all the cases of that nature, the question was, whether a feme covert not having actually conveyed her estate, but having previous to her marriage entered into a contract to convey to certain uses, that contract (even so far as it was a stipulation for her own benefit) should be considered as binding against her own heirs, in the same manner as the contract of any other person. A Court of Equity held that her heir was bound as she was bound herself. This question could not arise in the case of a mere contract to convey entered into after marriage; for the wife's mere contract after marriage would have been void, whether made for her own benefit or that of other persons."

16. The above distinctions seem equally to prevail when

(a) 2 Sch. & Lefroy, 463.

(b) Ambl. 468.

the wife is *cestuique* trust of her real property, the legal estate being outstanding ; because the same rule is applicable to a trust as to a legal estate, equity following the law. In *Wright v. Cadogan* (a), Lord Northington observed "that there was no rule so certain, so general, and so strongly adhered to by the ablest judges who had presided in equity, as to observe in *omnibus* the rules of law with respect to the regulation of property, and that such rules had been always strictly observed as principles in a Court of Equity."

17. If, then, the wife be *cestuique* trust in fee of real estates, and she and her husband, by articles in writing before marriage, agree that she shall have power to dispose of the trust property ; her disposition will be good against her heir (b), as it is where the wife is seised of the legal estate.

18. But if the agreement be after marriage, then, from the analogy between legal and equitable estates, such a contract would not have the effect of empowering the wife to appoint the absolute trust to the prejudice of her heir, who would be intitled to it at her death, if not disposed of by her in such a mode as by law is allowed to married women to pass their estates during coverture.

19. With respect to real estates which may accrue to the wife during the marriage by deed or will, if no trustees be interposed, and the instruments express that the lands shall be to her separate use, and that she shall have power to dispose of them ; although she take the legal fee, she may nevertheless appoint it, which will bind her heir and convert him into a trustee for the appointee, notwithstanding the case of *Goodhill v. Brigham*. (c)

20. The before-mentioned agreements between husband and wife, respecting her power to dispose of her real estates, belong entirely to the jurisdiction of equity ; for being execu-

(a) 2 Eden, 258 : see also 2 P. W. 713. (c) 1 Bos. & Pull. 193.

(b) See *Wright v. Englefield*, AmbL 468.

tory, neither they nor any executions of the powers intended to be given by her to them, convey legal titles. Since, therefore, a court of law cannot intermeddle with equitable rights, there can be no redress there for the appointees. (a)

21. In *Martin v. Mitchell* (b), a question was raised, whether a married woman having a power of appointment over real estate, to be exercised by deed attested by two witnesses, could be compelled to exercise it in favour of a person to whom she and her husband had agreed to sell. Sir T. Plumer, M. R., expressed an opinion that a specific performance of her agreement could not be compelled: she was relieved from the disability of coverture to the extent of enabling her to appoint by an instrument executed with the required formalities; without them it was only the agreement of a married woman, and as such invalid.

22. But a contrary doctrine has been held by Lord Lyndhurst, C., in the late case of *Dowell v. Dew*. (c) His Lordship there, adverting to Sir T. Plumer's observations in *Martin v. Mitchell*, remarked that such reasons would apply equally to the case of a defective execution of a power, whereas it had been long established that a defective execution of a power might be supplied. Notwithstanding Sir T. Plumer's doubts, he thought upon principle that such an agreement was binding, and might be supported in equity.

In the above case it had been held by Sir J. L. K. Bruce., V. C., that a specific performance of an agreement to make a lease entered into by the wife, who was tenant for life for her separate use, with a leasing power, might be enforced against her. (d) And his Honour's decree was affirmed by Lord Lyndhurst on the above grounds.

23. To establish in evidence the will of a married woman made in execution of a power, probate of it in the Ecclesias-

(a) See Lord Kenyon's judgment in *Doe v. Staple*, 2 Term Rep. 695.

(b) 2 Jac. & Walk. 413: see 1 Bro. C. C. 21.

(c) 12 Law J. N. S. Chan. 159.

(d) 1 Y. & C. C. C. 355.

tical Court is first necessary, in order to confirm judicially its testamentary nature.

24. Upon the subject of probate of a will made by the wife, Mr. Jacob remarks (a):

"According to the former practice of the Ecclesiastical Courts, a testamentary appointment of personal property by a feme covert, though made under a power given by the husband, was not admitted to probate without his concurrence. But the appointment was nevertheless carried into execution in equity; and when the husband had agreed by covenant, or bond, to permit his wife to dispose of property by will, he was liable to be sued at law for refusing his consent. (b) It is, however, now settled, that such an appointment cannot be made available, either at law or in equity, without probate. (c) And the appointment is now allowed to be proved without the husband's consent, the probate being limited to the property comprised in the power. (d) In these cases the Ecclesiastical Courts will not look nicely into the question whether the appointment is authorized by the power, as the grant of probate does not determine the right, but leaves it open for the decision of the temporal Courts. (e)"

25. However, in *Allen v. Bradshaw* (f), the Court, holding that it was bound to decide in the first instance whether the power had been duly executed, accordingly refused probate, on the ground that the power was not duly executed. And in a subsequent case (g), probate was refused,

(a) 2 Rop. H. & W. 188.

(b) See Vin. Ab. Baron & Feme, R. a : 4 Burn. Eccl. Law, 53: Daniel v. Goodwin, 2 Sugd. Powers, App. 20.

(c) *Ross v. Ewer*, 3 Atk. 160: *Stone v. Forsyth*, Dougl. 681: *Jenkins v. Whitehouse*, 1 Burr. 54: *Rich v. Cockell*, 9 Ves. 369: and see *Tucker v. Inman*, 1 Car. & Marsh. 83; 4 Man. & G. 1049; 5 Scott N. R. 843.

(d) See *Tappenden v. Walsh*, 1 Phill. 352: *Moss v. Brander*, *ibid.* 254.

(e) 1 Phill. 353: and see *Braham v. Burchell*, 3 Add. 263: *Draper v. Hitch*, 1 Hagg. 674.

(f) 1 Curt. 110.

(g) In the goods of *Monday*, 1 Curt. 590: see also in the goods of *Boswell*, 3 Curt. 745: and *Hughes v. Turner*, 4 Hagg. 30.

on the ground that there was no proof of the due execution of the will, the settlement not being before the Court.

26. But where it was admitted that a married woman had power to dispose of a sum of money placed to her credit at a banker's, but it was doubtful whether she had in fact disposed of it, the Court considering that to be a question of construction which did not fall within its province to determine, granted probate to the executors limited to the settled property, and all accumulations over which she had a disposing power, and which she had disposed of. (a)

27. However, in *Tugnal v. Hankey* (b), it was held, that although the Ecclesiastical Court can alone declare a writing to be testamentary, yet that it is not called upon to look at the power, but only to say, that if the testator had the power, the instrument is testamentary.

28. Accordingly, in the late case of *Barnes v. Vincent* (c), where the Ecclesiastical Court had refused probate of the will of a married woman, on the ground that the power was defectively executed, it was held on appeal to the privy council, that the Court ought to have admitted it to probate, leaving the question of the execution of the power to be dealt with by the Court, which might have to deal with the property which passed under the will; Lord Brougham, in delivering judgment, noticing the unsatisfactory state in which the law was placed by the practice of the Ecclesiastical Courts of refusing probate when they conceived that the power had not been duly executed.

29. It may therefore be considered as settled, that in future probate will be granted wherever a power is alleged, and no other objection arises.

30. It seems, however, that as the practice of equity was formerly not to require probate, if the Ecclesiastical Court should take upon itself to say that an instrument, which in

(a) *Ledgard and Parr v. Garland*,
1 Curt. 288.

(b) 2 Moo. P. C. C. 343.

(c) 10 Jur. 233.

the opinion of a Court of Equity is good as an exercise of the power, cannot be admitted to proof as a will owing to some defect of form, equity would resume its old jurisdiction and act independently of the Ecclesiastical Court. (*a*)

31. It is clear that the Ecclesiastical Court has no jurisdiction to decide whether the power was properly created. (*b*)

32. But the decision of the Ecclesiastical Court as to the testamentary nature of the instrument is conclusive upon the temporal Court. (*c*)

33. The production of probate will not alone be sufficient to induce a Court of Equity to act upon it; for there are other special circumstances which may be required to give the instrument effect as a valid appointment, viz. attestation, sealing, &c., with which circumstances the temporal Courts have not trusted the judgment of the spiritual Court. The witnesses, therefore, to these facts, must be examined in chief to prove that the will was the wife's act, &c.; and if an attestation be not required by the power, still her signature must be proved. (*d*)

34. But now appointments by will are to be executed as other wills, and, if so executed, are to be valid although the required solemnities are not observed. (*e*)

(*a*) Goldsworthy v. Crossley, 4 Hare, 144.

(*b*) *Ex parte* Tucker, in re Inman, 1 Man. & G. 519; 1 Scott, N.R. 379; S. C. Tucker v. Inman, 1 Car. & Marsh. 83.

(*c*) Douglas v. Cooper, 3 M. & K. 378.

(*d*) Rich v. Cockell, 9 Ves. 376.

As to the formalities required by powers, see 1 Sug. Pow. 278, 7th ed.

(*e*) See 7 W. 4. & 1 Vic. c. 26. sect. 10.

SECTION IV.

OF THE WIFE'S WILL WHERE SHE IS AN EXECUTRIX.

 2. *Effect of such a will.*

 | 3. *Probate of it.*

1. SINCE the husband has no beneficial interest in the personal estate which the wife takes in the character of executrix; and as the law permits her to take upon herself that office, it enables her, in exception to the general rule that a married woman cannot dispose of property, to make a will in this instance, without the consent of her husband (*a*), restricted, however, to the property to which she is intitled as executrix.

2. The effect of such an instrument is merely to pass by a *pure right of representation* to the testator or prior owner, such of his personal assets as remain outstanding, and no beneficial interest which the wife may have in any part of them (*b*); and with respect to the assets which may have been received by the feme-executrix during the marriage and not disposed of, they immediately become the husband's property, and are not affected by the will. (*c*)

3. The proper probate in this case is one with the wife's will annexed, limited to the goods which she was intitled to possess as executrix, under which probate no other property can be recovered. (*d*)

(*a*) 8 Vin. Ab. 42. pl. 9 : 4 Burn,
56 : 2 East, 552.

(*c*) *Hodsdon v. Lloyd*, 2 B. C. C.
534.

(*b*) *Stevens v. Bagwell*, 15 Ves.
156.

(*d*) See sect. 5. *infra*.

SECTION V.

OF THE WIFE'S POWER OF MAKING A WILL BY HER HUSBAND'S PERMISSION.

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| <hr/> 1. <i>Nature of such will.</i>
2. <i>General permission insufficient.</i>
3. <i>Husband may revoke consent before probate.</i>
4. <i>Where not allowed to retract consent.</i> | <hr/> 5. <i>What will be evidence of consent.</i>
6. <i>Will only valid if husband survives.</i>
8. <i>Unless where wife executrix.</i>
9. <i>Or where execution of power, or disposition of separate property.</i> <hr/> |
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1. THE wife may also, by her husband's permission, make a will disposing of her personal estate; the husband thus waiving the interest which the law secures to him in his wife's property by disabling her from disposing of it during the marriage.

2. In order to establish the will, a general assent that the wife may make a will is not sufficient; it should be shown that he has consented to the particular will which she has made (*a*), and his consent should be given when it is proved. (*b*)

3. He may therefore revoke his consent at any time during his wife's life, or after her death, before probate. (*c*)

4. But his consent may be implied from circumstances; and if after her death he acts upon the will, or once agrees to it, he is not, it seems, at liberty to retract his assent and oppose the probate. (*d*)

5. And when the will is made in pursuance of an express

(*a*) *King v. Bettesworth*, 2 Strange, 891. sect. 9. pl. 10: 4 Burn. Eccl. Law, 52: Anon. 1 Mod. 211.

(*b*) *Henley v. Phillips*, 2 Atk. 49.

(*d*) *Maas v. Sheffield*, 1 Rob. Ecc.

(*c*) *Swinburne on Wills*, part. 2. R. 365; 10 Jur. 417.

agreement or consent, it is said that a little proof will be sufficient to make out the continuance of that consent after her death. (a)

6. The husband's consent to the will intitles the wife's executor to claim such articles of her personal estate, which would have been her husband's, as her administrator. It appears, then, that this consent is personal to the husband. It is no more than a waiver of his rights as his wife's administrator. It therefore can only give validity to the instrument in the event of his being the survivor. Hence it follows, that if he die before his wife, the will is void against her next of kin; and she will be considered as having died intestate, if, after her husband's death, she make no disposition of her property.

7. And as by his death her will becomes void, so far as it derived its effect from his consent, it therefore does not pass the right to property bequeathed to her during the coverture. (b)

8. But it is still good so far as she was empowered to make it without his consent; and it therefore passes the right of representation to a person to whom she was executrix. (c)

9. And it will still be valid as an execution of a power, or as a disposition of property belonging to her during the coverture as separate estate. (d)

10. If she acquires other property after her husband's death, it does not pass by the previous will; for a different

(a) *Brook v. Turner*, 2 Mod. 170: *Maas v. Sheffield*, *ubi sup.* When the will is made in pursuance of an agreement before marriage, or of an agreement made after marriage, for consideration, it falls under the same rules as a will made by virtue of a power, as to which see *antè*, sect. 3.

(b) *Stevens v. Bagwell*, 15 Ves. 156.

(c) *Scammell v. Wilkinson*, 2 East, 552: *Birkett v. Vandercom*, 3 Hagg. 750.

(d) See *Dingwall v. Askew*, 1 Cox. 427: *Doe v. Weller*, 7 T. R. 478: *Tappenden v. Walsh*, 1 Phill. 352: *Morwan v. Thompson*, 3 Hagg. 239: and book 3, *infra*.

reason, viz., that at the time of making it, she had no testamentary power over such property. (a)

11. Mr. Roper, after stating the law upon this point, puts the case of a married woman being appointed executrix and residuary legatee of B; and that she, having choses in action of her own, survived her husband; and that he, by his will, made prior to his wife's will, after mentioned, bequeathed to her his residuary personal estate for her sole use, with a power by will to dispose of it, and appointed her executrix; and further, that after his death she acquired personal property. "Let us presume," he proceeds, (b) "that she made a will during the marriage, with her husband's consent (and which he subscribed), bequeathing all her property of every kind, to which she might be intitled at her death, and over which she might have a disposing power, whether as such executrix and residuary legatee of B, and of her husband as above, or otherwise, and appointed executors. Two questions may be asked: First, what effect this will had upon the different descriptions of property before mentioned? and secondly, what administrations ought to be granted by the Ecclesiastical Court? From what has been said, and what will appear in the next section concerning the will of a feme executrix (c), and from what may be collected from the cases of *Scammell v. Wilkinson* (d), and *Stevens v. Bagwell* (e), the following answers may be given, viz., that independently of the husband's consent, the wife's will passed, by right of representation, to her executors, the outstanding personal estate of B, whose executrix she was; that it had no operation upon her own personal estate, nor upon that which she acquired after her husband's death, nor upon the beneficial interest which she took as the residuary legatee of B. But that it did operate upon her husband's residuary personal estate, bequeathed by him to her, under the power

(a) Swinb. part. 2. sect. 9, pl. 5:
2 East, 556.

(b) 1 Rop. H. & W. 171.

(c) See sect. 4, *antè*.

(d) 2 East, 552—556.

(e) 15 Ves. 139.

given by his will for her to dispose of it, by her testament made either in his lifetime or afterwards. (a) And it is presumed that, upon the same principle by which the right of representation to B was transmitted by the wife's will to her executors, the right of representation to her husband was transmitted by it to them; for her will having been made with the assent of her husband, and a power given to her by his testament to make the will, and dispose by it of his residuary personal estate, and he having also appointed her his executrix, and consequently his sole legal personal representative, and since the appointment of an executor is essential to a perfect will, it is conceived that the husband's power to his wife to dispose by will of his residuary personal estate included the power of her appointing an executor to perform the trusts of it; and that, as such executor would represent the wife, he must also be the representative of the husband, whose representative the wife was by his own appointment. But this question was not alluded to in either of the cases last referred to, except that Sir William Grant observed, in *Stevens v. Bagwell* (b), that the Ecclesiastical Court limited the probate to the interest which the wife took under that will, and that no notice was taken of her nomination of executors.

“With respect to the administration to be granted by the Ecclesiastical Court in such a complex case, it appears that a limited probate of administration *cum scriptis annexis quoad* the effects of the wife's husband and of B, may be granted to her executors; but no probate or administration of her own choses in action not reduced into possession during the marriage, nor of her other property acquired after her husband's death, ought to be granted to them; for these not passing by her will, the administration of them belongs to her next of kin, and not to her executors; her executors, therefore, have no right to intermeddle with them. Hence

(a) 15 Ves. 154.

(b) Ibid.

appears the impropriety there would be, if the Ecclesiastical Court were to grant to the wife's executors an unlimited probate in such a case; for they would be enabled to recover property by it, which ought not to be administered under any of the wills, but by her administrator only; so that if a suit were instituted by her executors in the Ecclesiastical Court to obtain a general probate, the Court of King's Bench would grant a prohibition. (a) "

SECTION VI.

IN WHAT CASES THE WIFE IS PERMITTED TO CONTRACT, SUE,
AND BE IMPLEADED AS A SINGLE PERSON.

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| 3. <i>Where husband banished or abandons country for life, or marriage dissolved by act of parliament.</i> | 13. <i>Nor where divorce à mensâ et thoro.</i> |
| 4. <i>Where husband transported for years.</i> | 14. <i>Action by wife in name of husband.</i> |
| 5. <i>Effect of husband's temporary absence, or where he is a foreigner.</i> | 17. <i>Suit by wife alone in Ecclesiastical Court.</i> |
| 11. <i>Not where husband alien, though never in this country.</i> | 18. <i>Action by wife of lunatic.</i> |
| 12. <i>Unless where alien enemy.</i> | 19. <i>Wife sued alone may have process for costs in her name alone.</i> |
| | 20. <i>Effect of marriage of feme plaintiff.</i> |
| | 21. <i>Of feme defendant.</i> |
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1. THE decisions which more immediately preceded the important case of *Marshall v. Rutton* (b) had deeply entrenched upon the rules of common law, by which, with certain exceptions, the wife is unable to sue or be sued as a *feme sole*. But the doctrines of the common law have been restored by the solemn decision of the twelve judges in

(a) 2 East, 552.

(b) 8 T. R. 547.

Marshall *v.* Rutton, and these decisions (*a*) must now be considered as overruled.

2. The earliest cases upon this subject proceeded upon the ground of the husband being considered as dead, and the widow as being in a state of widowhood, or upon the marriage contract being dissolved by a divorce *à vinculo matrimonii*.

3. Accordingly, if the husband be banished from or abandon his country for life (*b*), or if the marriage be dissolved by act of parliament, in all such cases the wife's disabilities to contract, or to sue and be impleaded as a single woman, are removed.

4. The principle of these exceptions was afterwards extended to transportations for a certain number of years beyond which the husband's life might continue; for, during such exile, the wife being reduced to the same condition as she would have been if the sentence had consigned her husband to perpetual banishment, the Courts determined to impart to the wife the same powers and remedies, and to place her in the like situation as if the return of her husband had been from the first impracticable. During such period, therefore, the marriage contract is suspended, and the wife is to be considered as a single woman so as to be able to contract, to pay and receive money, to sue and be sued, and even liable to be taken in execution. And it would seem that when the husband's limited exile has expired, or if he be pardoned, the disabilities attending coverture will nevertheless continue suspended until his actual return. (*c*)

(*a*) Ringstead *v.* Lady Lanesborough, and Barwell *v.* Brooks, Cooke's Bankrupt Law, 28—31: Corbett *v.* Poelnitz, 1 T. R. 5: Derry *v.* Duchess of Mazarine, 1 Ld. Raym. 147: De Gaillon *v.* L'Aigle, 1 Bos. & Pull. 357.

(*b*) Belknap's case, Co. Litt. 132*b*.: Weyland's case, Co. Litt. 133 *a* :

Weyland's case, Co. Litt. 133 *a* : Wilmot's case, Moor's Rep. 851: Portland *v.* Prodgers, 2 Vern. 104: Newsome *v.* Bowyer, 3 P. W. 37: Sparrow *v.* Carruthers, cited in 1 T. R. 6., and 2 Bl. Rep. 1197.

(*c*) Carroll *v.* Blencow, 4 Esp. N. P. C. 27: Sparrow *v.* Carruthers, *ubi*

5. Mr. Roper observes (a): "It will appear from consideration of the above exceptions to the general rule of the common law, that they were founded upon the principle of the husband being under the necessity of absenting himself from this kingdom, and that his return to it was forbidden, and did not depend upon his own will and pleasure. When the principles laid down in *Marshall v. Rutton* are considered, and that the common law did not permit the husband and wife, by any agreement between themselves, to place her in the situation of a single woman as to the power of contracting &c., it is presumed that (notwithstanding the contrary decisions before referred to (b), and some posterior (c) to *Marshall v. Rutton*), whether the husband be a native subject or a foreigner, if he go abroad leaving his wife here, or being a foreigner, although he may never have been here, still as the husband's absence in either case depends upon his own will, his quitting or being out of the kingdom will not suspend the marriage contract, and place his wife in the situation of a feme sole, so as to restore the rights of disposition, personal liabilities, and powers which she parted with on entering into the marriage state. (d)"

6. In support of the above observations Mr. Roper cites the two following cases, which were decided subsequently to that of *Marshall v. Rutton*.

7. In *Marsh v. Hutchinson* (e), the first of these cases, the demand was against the wife alone for coals supplied to her the last three or four years; and her defence was coverture. In 1783, her husband (who was an Englishman) left

sup.: see also *ex parte* Franks, 7 Bing. 762, where it was held that the wife of a convict, who had been sentenced to transportation for fourteen years, was liable to be made a bankrupt, although her husband remained in the country. But see Co. Litt. 133a, and the observations of Lord Eldon in 2 Bos. & Pull. 231.

(a) 2 Rop. H. & W. 121.

(b) *Antè*, p. 70. note (a).

(c) *Walford v. Duchess of Pienne*: *Frank v. Duchess of Pienne*, 2 Esp. N. P. C. 554, 587.

(d) *Farrer v. Granard*, 1 New Rep. 80: *Kay v. Duchess of Pienne*, 3 Campb. 123: *Jones v. Smith*, 3 Mees. & Wel. 526.

(e) 2 Bos. & Pull. 226: *Chambers v. Donaldson*, 9 East, 471.

this country, and had occasionally been here since that period, but he having purchased the appointment of agent for the English packets at the Brill, in Holland, had for the last ten years resided there, and became possessed of lands in that country. In 1795 his agency ceased, in consequence of the irruption of the French into Holland, and he sent his wife and family to reside in this country, but he remained in Holland to look after his grounds, and with a view to the recovery of his situation, if the intercourse between England and Holland should be re-established. His wife was considered a married woman in the place where she lived, and her counsel insisted, that her husband being domiciled in a foreign country, from which he was not likely to return, his wife in this country must be treated as a single woman, and therefore capable of making contracts to bind herself. But the Court determined that the husband's residence in Holland, under the above circumstances, did not enable his wife, resident here, to bind herself by her own contract as a feme sole. And Heath, J., observed, that in the old cases of banishment and abjuration, as well as in the more modern ones of transportation, the husband could not return, as it would have been contrary to law; and that there was no case in which the wife had been held liable, her husband being an Englishman.

8. The second case was one where the action was brought by the wife as a feme sole; it was trespass (*a*), to which a plea of the plaintiff being a married woman was put in. It appeared that in 1805 the husband went to America, leaving his wife destitute, and that the plaintiff ever since lived separate from him, and made contracts here, and obtained credit as a single woman; and that she, for her support,

(*a*) *Boggett v. Frier*, 11 East, 301. In *Johnston v. Kirkwood*, 4 Dru. & War. 379, where the wife, who had been deserted by her husband, who had left the country several years before, filed a bill as a feme sole, there being some evidence that he was alive, the court gave leave to amend the bill, by making the husband a defendant, and charging him to be out of the jurisdiction, and to have abandoned the wife.

had, since the year 1805, carried on trade as a feme sole. The Court decided that the plaintiff could not sustain the action.

9. So, in *Williamson v. Dawes* (*a*), where the husband, who had been a bankrupt, had absconded, it was held that an action could not be maintained against his wife as a feme sole; Tindal, C. J., remarking, that here there was no civil death of the husband, nor could an involuntary absence be predicated, for the husband might return to this country whenever he pleased, if there happened to be any legal defect in the proceedings against him. And Bosanquet, J., observed, that it could not be said that if a party committed an offence which *might* amount to a felony, and quitted the kingdom, such absconding was analogous to a transportation for life, or for a term of years, by the judgment of a court of law.

10. In *Kay v. Duchess of Pienne* (*b*), Lord Ellenborough thought that if the husband was an alien and had never been in this country, the wife might be sued as a feme sole. And in *Stretton v. Busnach* (*c*), where an action was brought against the wife of an alien who had been in this country, the Court seems to have intimated an opinion that if the husband's absence had not been temporary, the wife might have been sued as a feme sole.

11. But in the late case of *Barden v. Keverberg* (*d*), Parke, B., remarked that there must have been some misapprehension of what Lord Ellenborough said in the case of *Kay v. Duchess of Pienne* (*e*), or his Lordship must have been in error, because he referred to the case of *Derry v. Duchess of Mazarine* (*f*) in support of his proposition, whereas that was the case of an alien enemy who could not

(*a*) 2 Moo. & Scott, 352.

(*b*) 3 Campb. 123: see 2 Bos. & P. 233.

(*c*) See the report of this case in 4 Moo. & Scott, 678: this does not

appear from the report in Bingham, 1 Bing. N. C. 139.

(*d*) 2 Mees. & Wels. 61.

(*e*) *Ubi sup.*

(*f*) 1 Ld. Raym. 147.

be in England lawfully, analogous to the case of the wife of a person transported.

In the above case of *Barden v. Keverberg* the wife was sued as a feme sole. She pleaded coverture, to which the plaintiff replied that the husband was an alien who had never been in the kingdom ; and that the plaintiff had contracted with her as a feme sole on her own credit. There was no evidence that the defendant had represented herself as a married woman. It appeared that the husband of the defendant was a foreigner resident in Holland, and it did not appear that he had ever been in England. Parke, B., said, supposing the replication good, although he had a strong opinion it was not (because the cases in which the wife had been held liable, her husband being abroad, applied only where he was *civiliter mortuus*), the plaintiff was bound under it to make it out that the husband was an alien, that he was resident abroad, and never in this country, which facts were admitted ; and also that the defendant had represented herself as a feme sole, or that the plaintiff dealt with her believing her to be a feme sole. That the law did not make her liable as such, merely because her husband was an alien and continually abroad.

12. But when the husband is prevented from coming here, as in the instance of his being an *alien enemy*, then the principle of exception applies. (a)

13. A divorce *à mensâ et thoro* for adultery does not dissolve the relation of husband and wife, and, therefore, does not render the wife liable to be sued as a feme sole. (b)

14. In cases where the wife has caused an action to be commenced in the name of her husband, the Court has refused to stay the proceedings on the application of the defendant. (c)

(a) *Derry v. the Duchess of Mazarine*, 1 Ld. Raym. 147.

(b) *Lewis v. Lee*, 3 B. & C. 291 ;
5 Dow. & Ry. 98 : *Ellah v. Leigh*,
5 T. R. 679 : *Hookham v. Chambers*,

3 Brod. & Bingh. 92 : *Fairthorne v. Blaquiere*, 6 Maule & Sel. 73. "

(c) *Chambers v. Donaldson*, 9 East, 471 : *Mingotti v. Drummond*, 1 Hanmer, 469.

15. And where the husband had by a separation deed agreed to give up the wife's property to her, and she afterwards brought an action in their joint names for a debt due to her as executrix, a plea of a release given by the husband was set aside on motion. (a)

16. But in *Harrison v. Almond* (b), where the husband and wife were living separate, and the wife had brought an action for an assault without her husband's authority, it was held, on the application of the husband, that the proceedings must be stayed until an indemnity against costs was given to him.

17. A married woman, in the absence of her husband, will be allowed to sue alone in a testamentary cause in the Ecclesiastical Court, on finding security for costs. (c)

18. The wife of a lunatic, who has no committee, has a sufficient implied authority to sue in the name of the lunatic. (d)

19. Where the wife, being sued alone, pleads coverture, and a verdict is found for her upon this plea, she is intitled to costs. (e) The process for costs may be in her name alone, for the plaintiff having declared against her as sole, he is concluded from denying it. (f) The husband in such a case cannot have execution without a *scire facias*. (g)

20. If a woman marries during the pendency of an action brought by her, the coverture may be pleaded in abatement, as a plea *puis darrein continuance*. (h) But it is matter for plea in abatement only. (i) If it be not

(a) *Innell v. Clement*, 4 B. & Ald. B. 347; 4 Dowl. & L. P. P. 185; 419. 15 Law J. N. S. C. P. 262.

(b) 4 Dowl. P. C. 321: see also (f) *Wortley v. Rayner*, Dougl. 614.
Morgan v. Thomas, 2 Dowl. P. C. (g) *Ibid*.
 332; 2 Crompt. & Mees. 388. (h) Bull. N. P. 309: *Walker v.*

(c) *Sutor v. Christie*, 2 Add. 150: Golling, 11 Mees. & W. 78.
 see 10 Mod. 64. (i) *Bendix v. Wakeman*, 12 Mees.

(d) *Rock v. Slade*, 7 Dowl. P. C. 22. & W. 97; 13 Law J. N. S. Ex. 15:

(e) *Findley v. Farquharson*, 3 C. Guyard v. Sutton, 3 C. B. 153; 15

thus pleaded, the action proceeds as if she were still a feme sole. (a)

21. It is said that if a feme defendant marries after the commencement of the action, her coverture cannot be pleaded in abatement (b); nor can she bring a writ of error on this ground. (c) But where a feme sole was sued in an inferior Court, and removed the cause to the King's Bench by habeas corpus, and there pleaded that she was covert at the time of suing out the habeas corpus (d), this plea was held good: in another case, a similar plea was set aside on motion. (e)

SECTION VII.

OF THE WIFE'S POWER OF TRADING AS A FEME SOLE BY THE CUSTOM OF LONDON.

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| 1. <i>The custom.</i> | 6. <i>Whether intitled in equity to wife's savings.</i> |
| 2. <i>Construed strictly.</i> | 7. <i>Suits by or against wife sole trader.</i> |
| 3. <i>The trade must be carried on in the city.</i> | 9. <i>Husband must be party.</i> |
| 4. <i>Husband's power in determining the trading.</i> | 10. <i>Liable to the bankrupt laws.</i> |
| 5. <i>Intitled to wife's savings in law.</i> | 11. <i>Bond of wife sole trader void.</i> |
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1. THERE is one exception to the wife's disability arising from coverture founded upon particular custom, for by the custom of the city of London, a married woman is enabled to carry on trade as a feme sole merchant. The custom, as

Law J. N. S. C. P. 225; 8 Jur. 459: (c) King v. Jones, 2 Ld. Raym. see Chantler v. Lindsay, 16 Mees. & 1525; 2 Str. 811.
 W. 82; S. C. 4 Dowl. & L. P. P. (d) Hetherington v. Reynolds, 1 Salk. 8; 11 Mod. 142.
 339, nom. Charlton v. Lindsey. (e) Haddock v. Howard, Barnes, 265: see also Hollis v. Freer, 5 355.
 Dowl. P. C. 47.

(b) 1 Chitty on Pleading, 465,
 7th ed. by Greening.

translated from the *Liber albus* in the town-clerk's office, is as follows: "Where a feme, covert of the husband, useth any craft in the said city on her sole account, whereof the husband meddleth nothing, such a woman shall be charged as a feme sole concerning everything that toucheth the craft; and if the husband and wife be impleaded, in such case the wife shall plead as a feme sole; and if she be condemned, she shall be committed to prison till she have made satisfaction, and the husband and his goods shall not in such case be charged nor impeached."

2. Upon this custom, which must be construed with strictness (*a*), the following observations occur:—

3. The trade must be carried on within the city, and on the wife's sole account: it seems, therefore, that if by any means it can be proved that her husband had any concern in it, the case will not be protected by the custom. (*b*)

4. The husband's intermeddling is expressly provided against by the custom. He may, however, determine his wife's trading in future, but he cannot do so in retrospect; neither can he do any act to injure her creditors, who are intitled to be satisfied out of her property in trade. (*c*)

5. But after those demands are satisfied, he may, as it would seem, by law possess himself of the surplus of her property; for the custom does not extend to this point, it regarding only trade and commerce. (*d*)

6. Yet although he may do so at law by virtue of his legal right, still it may, as Mr. Roper observes (*e*), be a question whether a Court of Equity would not, as in the instances after mentioned, consider this surplus as the wife's separate property, she having procured it by her own industry, and with the permission of her husband, and without any risk incurred by him.

(*a*) 1 Roll. Abr. 567: 2 Leon. 109.

(*b*) Langham v. Bewett, Cro. Car. 68: 3 Burr. 1782.

(*c*) Lavie v. Phillips, 3 Burr. 1782, 1785.

(*d*) Lavie v. Phillips, *ubi sup.*

(*e*) 2 Rep. H. & W. 125.

7. The proper tribunals for the wife to sue or be impleaded are in this instance those belonging to the city; and the superior Courts will not interfere with these jurisdictions, since the inferior judges are best acquainted with the customs prevailing within those limits. (*a*)

8. But if the wife be sued in one of the Courts at Westminster, and the custom be pleaded, it will be there attended to and allowed. (*b*)

9. And when she sues or is impleaded either in the city Courts, or in those above, her husband must be joined for conformity (*c*); for a married woman cannot singly execute a warrant of attorney.

10. As a necessary consequence of the wife's power to contract debts in her business, she is liable to be a bankrupt; and this is for her advantage, for a different construction would subject her to perpetual imprisonment. (*d*)

11. In *Read v. Jewson* (*e*), the Court said that a feme covert sole trader cannot execute a bond, because that would bind her heirs if she had real assets, which no custom could warrant.

(*a*) Cro. Car. 69 : 3 Burr. 1782 : *Beard v. Webb*, 2 Bos. & Pull. 97, in which case all the authorities are collected and commented upon by Lord Eldon.

(*b*) 3 Burr. 1782 : *ex parte Car-*

ington, 1 Atk. 206 : but see 1 Car. & P. 266.

(*c*) *Caudell v. Shaw*, 4 Term Rep. 361 : 2 Bos. & Pull. 98 : 2 Wils. 3.

(*d*) 3 Burr. 1783.

(*e*) Cited 4 Term Rep. 362.

SECTION VIII.

IN WHAT CASES THE HUSBAND AND WIFE MUST BE JOINED
AS DEFENDANTS.

11 & 12, 9. 422.

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| <p>2. <i>Husband and wife must be joined where contract by wife dum sola.</i></p> <p>3. <i>Wife cannot be joined where contract after marriage.</i></p> <p>4. <i>Husband and wife must be joined where tort by wife before marriage.</i></p> | <p>5. <i>Or where tort by wife alone during marriage, or by both.</i></p> <p>6. <i>Conversion how to be stated in trover.</i></p> <p>7. <i>Where tort by husband and wife act of husband only.</i></p> <p>8. <i>Appearance where husband sued jointly with wife.</i></p> |
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1. IN cases not within the exceptions detailed in the preceding sections, the wife can at law only be sued jointly with her husband.

2. Where the cause of action is founded upon a contract by the wife *dum sola*, as a debt contracted by her before marriage, the action must be brought against the husband and wife jointly. (a)

3. But in an action founded on a contract subsequent to the marriage, the wife cannot be joined as a defendant (b), the contract being void as against her; and for the same reason, if the contract was previous to the marriage, a subsequent promise by the wife cannot be alleged. (c)

4. Where the cause of action is founded on a tort committed by the wife before marriage, as in trover, the husband and wife must be joined as defendants. (d)

5. Where the cause of action arises from a tort by the

(a) *Mitcheson v. Hewson*, 7 T. R. 348; *Richardson v. Hull*, 1 Brod. & Bing. 50.

(b) See 4 Vin. Ab. 93, pl. 5: and *Frazer v. White*, 1 Scott, N. R. 604; 4 Jur. 796.

(c) *Morris v. Norfolk*, 1 Taunt. 212: see *Pittan v. Foster*, 1 B. & C. 248; 2 Dowl. & Ry. 363.

(d) 2 Saund. 47 l. note.

wife alone during the marriage, as in an action for slander by her (*a*), or where it arises from a tort committed by the husband and wife together, the action lies against both. (*b*)

6. So, trespass lies against the husband and wife for their joint act. (*c*) In an action of trover against them, the conversion, if subsequent to the marriage, should be stated to be to the use of the husband alone, as the wife cannot acquire property by it (*d*): but after verdict a declaration stating the conversion to be to the use of the husband and wife has been held good, as the conversion might have been by destruction, and consequently without the acquisition of property. (*e*)

7. But in some cases a tort by husband and wife may be considered in law as the act of the former, and the action may be brought against him alone: thus, trover lies against the husband alone on a conversion by both. (*f*)

8. Where the husband is sued jointly with his wife, an appearance should be entered by him for both; but where he appeared for himself alone, it was held that this appearance could not be treated as a nullity (*g*); but the plaintiff has been permitted, after having served his wife, to enter an appearance for her under the statute 12 Geo. 1. c. 29., and to sign judgment for want of a plea. (*h*)

(*a*) *Swithin v. Vincent*, 2 Wils. 227.

(*b*) *Com. Dig. Bar. & Feme*, Y.

(*c*) *Vine v. Saunders*, 4 Bing. N. C. 96; *S. C.* 5 Scott, 359; and 6 Dowl. P. C. 233.

(*d*) 2 Saund. 47 *l.* note: *Cro. Car.* 254.

(*e*) *Keyworth v. Hill*, 3 Barn. & Ald. 685.

(*f*) 2 Saund. 47 *l.* note: see 1 Chitty on Pleading, 104, 7th ed. by Greening.

(*g*) *Clarke v. Norris*, 1 Hen. Bl. 235.

(*h*) *Russell v. Buchanan*, 6 Price, 139. See upon this subject, 2 Archbold's Practice, 1097, 8th ed.

SECTION IX.

OF THE DISCHARGE OF THE WIFE WHEN ARRESTED ON MESNE AND FINAL PROCESS, AND OF HER DISCHARGE UNDER THE INSOLVENT DEBTORS ACT.

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| <hr/> 1. <i>Discharged when arrested on mesne process without husband.</i>
2. <i>Rule of the courts where wife arrested with husband.</i>
3. <i>Husband if arrested must put in bail for both.</i>
4. <i>Where wife not discharged when arrested on mesne process.</i> | <hr/> 6. <i>Where wife will be discharged when taken in execution.</i>
8. <i>Wife not discharged having married during suit, and been taken in execution alone.</i>
9. <i>Attachment for nonpayment of costs.</i>
10. <i>May take the benefit of the insolvent act.</i> <hr/> |
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1. IN actions against the husband and wife for debts incurred by her before the marriage, if she be arrested on mesne process, either with or without her husband, she will be discharged on entering an appearance, or the bail bond, if any, will be ordered to be given up to be cancelled. (*a*) And this will be the case, although her husband constantly reside abroad (*b*), and although she and her husband live apart under articles of separation, and he allows a separate maintenance (*c*), or even although, at the time she obtained the credit, she appeared and acted as a feme sole, if she did not deceitfully represent herself as such, in order to obtain

(*a*) *Edwards v. Rourke*, 1 T. R. 486; *Crookes v. Fry*, 1 B. & Ald. 165; *Taylor v. Whitaker*, 1 Dow. & Ry. 225; *English v. Cabellano*, 1 Law J. K. B. 149. See 1 Taunt. 255, and 1 Archbold's Practice, 640, 8th ed. by Chitty, where the reader will find full information upon the subject of this section. As to the wife's discharge in equity, see *Attorney-General v. Adams*, 12 Jur. 637.

(*b*) 1 East, 17*n*; see *De Gaillon v. L'Aigle*, 1 Bos. & Pull. 8.

(*c*) *Wardell v. Gooch*, 7 East, 582.

the credit (*a*); or if, by mistake, she alleged her belief that her husband was dead (*b*), or if the plaintiff, at the time of giving the credit, knew her to be a married woman. (*c*)

2. The practice of the Court of Queen's Bench is the same where she is arrested with the husband (*d*); but in this case the Court of Common Pleas has sometimes refused to discharge her. (*e*)

3. But the husband, if arrested, is not discharged without putting in bail for both. (*f*) And where the husband was an attorney, it was held that he was not privileged from arrest in such an action. (*g*)

4. However, if the wife has fraudulently held herself out as a feme sole (*h*), or has done acts equivalent to a representation of herself to be a feme sole, as where she has drawn or accepted bills of exchange (*i*), or where the fact of the marriage is in doubt (*k*), she will not be discharged, but will be left to her plea of coverture in the usual course of proceeding.

5. In *Moses v. Richardson* (*l*), where the wife had suffered judgment to go by default, and had been taken in

(*a*) *Collins v. Rowen*, 1 New Rep. 54; *Hollingale v. Lloyd*, 6 Dowl. P. C. 565; 3 Mees. & W. 416.

(*b*) *Pitt v. Thompson*, 1 East, 16.

(*c*) *Slater v. Mills*, 7 Bing. 606; 5 Moo. & P. 602; 1 Dowl. P. C. 230; *Wardell v. Gooch*, 7 East, 582.

(*d*) *Crookes v. Fry*, 1 B. & Ald. 165; *Cornish v. Marks*, 6 Mod. 17; *Harrison v. Bearcliffe*, 2 Str. 1272; *Taylor v. Whitaker*, 1 Dow. & Ry. 225; *Lawson v. Shepherd*, 8 Law J. K. B. 104.

(*e*) *Roberts v. Mason*, 1 Taunt. 254; see 5 B. & Ald. 759: *contra*, Anon. 3 Wils. 124.

(*f*) *Roberts v. Mason*, *ubi sup.*: *Taylor v. Whitaker*, *ubi sup.*: *Crookes v. Fry*, 1 B. & Ald. 165.

(*g*) *Roberts v. Mason*, *ubi sup.*

(*h*) *Waters v. Smith*, 6 T. R.

451; *Partridge v. Clarke*, 5 T. R. 194; *Luder v. Justice*, 1 Bing. 344; 8 Moo. 346; 2 Law J. C. P. 10; *Simon v. Winnington*, 1 Dowl. P. C. 16; *Hall v. Barber*, 1 Dowl. P. C. 8: *contra*, *Carlisle v. Starr*, 9 Price, 161; see *Harvey v. Cooke*, 5 B. & Ald. 747; *Hookham v. Chambers*, 3 Brod. & Bing. 92; *Ex parte Watson*, 16 Ves. 265; *Pannell v. Tayler* 1 Turn. & Russ. 100: 3 Bos. & Pull. 128—220.

(*i*) *Walsh v. Gibbs*, 4 Dowl. P. C. 683; *Prichard v. Cowlam*, 2 Marshall, 40; *Jones v. Lewis*, 7 Taunt. 55.

(*k*) *Partridge v. Clarke*, 5 T. R. 194; *Pearson v. Meadon*, 2 Bl. Rep. 903.

(*l*) 8 B. & C. 421.

execution, the Court refused to discharge her, but left her to her writ of error.

6. Where a judgment is obtained against the husband and wife, the writ of *capias ad satisfaciendum* may be issued against both (*a*), and the wife will not be discharged unless it appears that she was arrested by collusion between the plaintiff and her husband (*b*), or that she was improperly joined in the action (*c*), or that she has no separate property out of which the demand can be satisfied. (*d*)

7. The burden of showing that the property is for the wife's separate use lies upon the plaintiff. (*e*) But where it appears, from the affidavits on the other side, that there are reasons for believing that the wife has separate property, the *onus* of proof will then be thrown on her. (*f*)

8. In the late case of *Beynon v. Jones* (*g*), the Court refused to discharge the wife who had been sued alone as a feme sole, and had married during the suit, and been taken in execution alone. Sir F. Pollock, C. B., there said:—"The whole practice of discharging married women who are in lawful custody on a *ca. sa.* is of very recent date, and certainly appears to rest on no principle whatever. The writ of *ca. sa.* is the right of the plaintiff, as the result of

(*a*) See *Longstaff v. Rain*, 1 Wils. 149; *Anon.* 3 Wils. 124; *S. C. Roberts v. Andrews*, 2 W. Bl. 720; *Berriman v. Gilbert*, Barnes, 203; *Pitts v. Miller*, 1 Stra. 1167; *Finch v. Duddin*, *ibid.* 1237; *Newton v. Rowe*, 7 Man. & G. 329; 8 Scott, N. R. 27; 2 Dowl. & L. 80; *Beynon v. Jones*, 15 Mees. & Wel. 566; 15 Law J. N. S. Ex. 303; and *Newton v. Boodle*, 16 Law J. N. S. Q. B. 146; 11 Jur. 628, where the point was fully considered.

(*b*) *Pitts v. Miller*, *ubi sup.*: *Longstaff v. Rain*, *ubi sup.*: *Roberts v. Andrews*, *ubi sup.*

(*c*) *Rownson v. Williamson*, Barnes, 207.

(*d*) *Chalk v. Deacon*, 6 Moo. 128; *Sparkes v. Bell*, 8 B. & C. 1; *Evans v. Chester*, 6 Dowl. P. C. 140; 1 Jur. 778; *Findley v. Farquharson*, 3 C. B. 347; 4 Dowl. & L. P. P. 185; 15 Law J. N. S. C. P. 262; and see *Tidd's Practice*, vol. 1, p. 194, vol. 2, p. 1026, 9th ed.

(*e*) *Hood v. Matthews*, 2 Dowl. P. C. 149.

(*f*) *Ferguson v. Clayworth*, 6 Q. B. 269; 2 Dowl. & L. 165; 13 Law J. N. S. Q. B. 329; 8 Jur. 709.

(*g*) 15 Mees. & Wel. 566; 15 Law J. N. S. Exch. 303.

his judgment, and it is admitted that under such a writ the sheriff is bound to take the party against whom the writ is directed, whether she be under coverture or not: he is bound to do so, not only where she is sued with her husband, but also where, as in this case, she has been sued alone as a feme sole, and has married during the suit. (a) Since, therefore, the plaintiff has a right to take the feme covert into execution, and to detain her in satisfaction of his debt, it would seem on all principle to follow, that the Court cannot interfere to discharge her out of custody, unless there be some special circumstances requiring the Court in the exercise of its equitable jurisdiction to interfere and prevent the plaintiff from availing himself of his legal right. But certainly, in modern times, the Courts, where judgment has been recovered against husband and wife, and both have been taken in execution, have assumed the right of discharging the wife out of custody, if she has no separate property, on no other ground, apparently, than that it is hard to detain in custody a defendant who cannot by law acquire property wherewith to satisfy the debt. This, it must be admitted, is rather making the law than administering it. At the same time, the practice has prevailed so long in the case of a judgment against husband and wife, that in such a case we should probably not feel ourselves warranted in deviating from the ordinary course. But in the case of a rightful judgment against a married woman *alone*, there is no decided case authorising the Court in discharging her where she has been taken on a *ca. sa.*; and there is certainly a distinction between that case and the case of a judgment against husband and wife. In the former case, the discharge of the wife deprives the plaintiff of *all* possible chance of recovering his debt; whereas, in the latter, he has still the husband to whom he may resort. The distinction is not, indeed, at all satisfactory. There seems to be no more principle to

(a) *Doyley v. White*, Cro. Jac. 623.

warrant the Court in depriving a plaintiff of part of his legal right than in depriving him of the whole ; still it may be said, that, in one, the practical justice is less than the other ; and, therefore, although finding the practice established in the case of a judgment against husband and wife, we might not feel justified in refusing to act, in the case of a joint execution, on what must be considered the established practice, yet seeing no principle to warrant us, and it being admitted that no case can be found in which a married woman has been discharged where she has been the sole defendant, and has been taken on a *ca. sa.*, we do not feel warranted in discharging her in this case, and so altogether depriving the plaintiff of the fruit of his judgment."

9. An attachment for nonpayment of costs will not be granted against the wife. (*a*)

10. A married woman in custody for debt could not be discharged under the acts for the relief of insolvent debtors which were in force previously to the statute 3 Geo. 4. c. 125, those acts having required that the insolvent should, before the discharge, execute a warrant of attorney and a conveyance, terms which could not be complied with by a married woman. (*b*) But by the statute 3 Geo. 4. c. 123. s. 12., which was repealed by the 7 Geo. 4. c. 57., which contained similar provisions, the provisions of the insolvent debtors acts were extended to married women. And the act for the relief of insolvent debtors now in force (*a*) contains similar provisions. It is enacted that the order of the Court vesting the property of the woman in the provisional assignee is to operate upon all property real and personal to which she may be intitled for her separate use, or over which she shall have any power of disposition notwithstanding her coverture, or which may be vested in

(*a*) *Doe d. Allanson v. Carfield*, 6 Dowl. P. C. 523 : but see *Reg. v. Johnson*, 5 Q. B. 335 : and in re *Ruth Cope*, *ib. n.* (*b*) *Ex parte Deacon*, 5 Barn. & Ald. 759. (*a*) 1 & 2 Vict. c. 110, sect. 101.

trustees for her benefit, and upon all effects in her actual possession, and upon all other real and personal estate and effects to which she may be intitled in any manner in possession, remainder, or reversion ; and the provisions contained in the act concerning the real and personal estate of any prisoner whose estate shall be vested in the provisional assignee are to apply to her real and personal estate as if she were a feme sole, subject only and without prejudice to the rights of her husband : she is also to execute a warrant of attorney, under which a judgment may be entered up against her for the amount of her debts : the judgment thus entered up is not to prejudice the rights of her husband, except that the same is to be taken to be her debt in case she shall die in his lifetime, to the end that it may be discharged out of her personal assets in a course of administration or out of her real estate, but without prejudice to the husband's right as tenant by the curtesy : in case of her becoming, during the coverture, intitled to any property for her separate use, the judgment may be enforced against such separate property by suit in equity or otherwise, for the purpose of obtaining payment of the debts from which she was discharged : in case of her surviving her husband, the judgment may be enforced against her or her property in the same manner as if she had been a feme sole at the time of executing the warrant of attorney. Her discharge is not to operate to release the husband from the debts.

CHAPTER XXV.

OF THE WIFE'S POWER OF ENFORCING HER LEGAL OR EQUITABLE RIGHTS, WHEN SHE HAS ELOPED OR COMMITTED ADULTERY.

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| 2. <i>Court will not interfere where wife applies for a favour.</i> | 3. <i>Secus, where she applies for recovery of a right.</i> |
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1. WE have already considered some of the consequences of the wife's abandoning her home, and living in adultery. (*a*)

2. Mr. Roper deduces this proposition from the majority of the cases, that when the wife unnecessarily elopes from her husband, whether she does or does not live in adultery, if she apply to a Court of Equity for a *favour* (and not for a *right*), as for a maintenance out of her property, the interest of which her husband is intitled to receive, the Court will not interfere in her behalf. (*b*)

3. But that if she apply to its jurisdiction for the recovery or enforcing of her rights, as for the performance of articles before the marriage for a settlement to her separate use; there the Court must interfere, since the law has not made elopement or adultery a forfeiture of any such interests, but of dower only.

4. Upon this principle, therefore, notwithstanding the loose note of the case of *More v. the Earl of Scarborough* to be found in *Equity Cases Abridged* (*c*), and the *obiter dictum* of Lord Hardwicke in *Moore v. Moore*, after mentioned, he presumes that a Court of Equity cannot, at the

(*a*) Vol. I. pp. 252. 265. 467. 538. (*b*) 2 Rop. H. & W. 134.
See also *Buchanan v. Buchanan*, 1 (*c*) Vol. 2. 156, pl. 7.
Ball & B. 203.

suit of the husband, enjoin the trustees of an adulteress from proceeding at law to compel payment of her pin-money, except upon paying up the arrears; nor refuse to interfere on her part to compel the execution of a settlement in pursuance of articles entered into previously to the marriage.

5. In *Lee v. Lee*, shortly reported in Dickens (*a*), the Chancellor refused *in limine* to restrain the husband from receiving the rents of estates which before the marriage had been settled to the wife's separate use; the reason given by his Lordship for the refusal was, that the wife having left her husband without a cause, and refusing to return, the motion, if granted, might altogether prevent their future cohabitation. The refusal, therefore, was not a decision of the question in the cause, but it was made under certain circumstances, and with a particular view, viz. to cause a reconciliation between man and wife.

6. The case of *Moore v. Moore* (*b*), referred to in *Lee v. Lee*, is one of quite a contrary effect. There 100*l.* a year pin-money were, before marriage, secured by a term for years in trustees for the wife's separate use. After twenty years' cohabitation in harmony they quarrelled, and she left him, and went abroad. Her trustees brought an ejectment for recovering possession of the term, the annuity being in arrear. To stay these proceedings, the husband filed a bill complaining of his wife's elopement, offering to take her back again, and to forgive what was passed; but Lord Hardwicke, after observing that possibly the agreement before marriage might have been designed to provide for the wife if the parties should disagree, and that the husband had made payments of the annuity since the wife's elopement (a strong presumption that he thought at least her separation was excusable), ordered the arrears of the pin-money to be paid, with costs; and, upon payment and keeping down the growing payments of the annuity, his Lordship con-

(*a*) Pages 321. 806.

(*b*) 1 Atk. 276.

tinued the injunction which had been obtained by the husband.

7. The right of the wife to call upon a Court of Equity to enforce her equitable interests, although she may have left her husband, and also have added to that impropriety the crime of adultery, appears to be established by the two following cases.

8. In *Sidney v. Sidney* (*a*), the wife by her bill prayed the specific performance by the husband of his agreement in articles made before marriage, in which he covenanted to convey estates to the use of himself and wife for their lives in succession, &c.; and she, a minor, with consent of guardians, covenanted to settle her estates as therein mentioned. The husband stated in his answer, that his wife had withdrawn herself from him, and very much misbehaved herself. There was strong evidence of her criminal conversation with another man, and there was also some proof of the husband's adultery; yet the wife obtained a decree for a specific performance at the Rolls, from which the husband appealed to Lord Talbot, who confirmed the decree, observing that the answer did not sufficiently put the fact of adultery in issue (*b*), and he therefore could not decide upon it; that articles for a jointure were considered in equity as an actual and vested jointure; and that it was not forfeited either by the wife's elopement or adultery, and that the reason why she loses her dower by committing adultery, is from the effect of the statute of Westminster the 2nd. (*c*)

9. The second case is *Blount v. Winter*. (*d*) There were two bills filed, the one by trustees in marriage articles, and the children of the marriage against husband and wife; and the other by the husband against his wife and children. The first bill prayed a performance of the articles; and the

(*a*) 3 P. W. 269.

(*b*) 1 Atk. 276.

(*c*) Chap. 24.

(*d*) Stated in a note, 3 P. W.
277: *S. P. Sengrave v. Seagrave*,
13 Ves. 444.

husband by his answer, and also by his own bill, resisted the performance, so far as the articles made a provision for his wife, alleging and proving that she lived separate from him in adultery. The Court was of opinion that this was no reason for a non-performance of the articles as to the wife, and decreed accordingly in the first cause, and dismissed the husband's bill, but without costs.

10. Upon these authorities Mr. Roper concludes (*a*), that the wife's elopement only, or her elopement and adultery, do not deprive her of the power of enforcing any of her legal (*b*) or equitable rights, with the exception of her right to dower.

(*a*) 2 Rep. H. & W. 137.

121 : Baynon v. Batley, 8 Bing.

(*b*) Field v. Serres, 1 New Rep. 256; 1 Moo. & S. 239.

BOOK THE SECOND.

OF CERTAIN RIGHTS ACQUIRED BY THE HUSBAND OR WIFE BY SETTLEMENT OR CONTRACT.

CHAPTER I.

OF THE HUSBAND'S INTEREST IN HIS WIFE'S CHOSSES IN ACTION AS A PURCHASER, BY MAKING A SETTLEMENT UPON HER.

SECTION I.

IN WHAT CASES AN ANTENUPTIAL SETTLEMENT WILL INTITLE THE HUSBAND TO HIS WIFE'S CHOSSES IN ACTION.

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| <p>2. <i>Husband not intitled unless agreement expressed or implied.</i></p> <p>3. <i>Only intitled to extent of agreement.</i></p> <p>17. <i>Rule laid down by Mr. Roper.</i></p> <p>18. <i>Not necessary that settlement should be adequate to wife's fortune.</i></p> | <p>19. <i>Where husband or his assignees must perform stipulations on his part before receipt of wife's fortune.</i></p> <p>20. <i>Effect where husband's covenant future and contingent.</i></p> <p>21. <i>Where present and certain.</i></p> <p>22. <i>Where, though future, it can be performed.</i></p> |
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1. WE have already noticed that on marriage, the wife's choses in action are not absolutely vested in the husband, and that where they are not received by him or his assignees in his lifetime, or in certain cases released, they survive to the wife. The husband may, however, as a purchaser acquire the sole and absolute interest in his wife's choses in action, whether immediately recoverable or in expectancy, although she survive him, by making a settlement upon her previously to the marriage.

2. But a mere settlement upon marriage will not intitle the husband to his wife's fortune. There must be an agreement for the purpose, either expressed or implied.

3. And if the stipulation be for a part only of her property, that necessarily excludes the residue; so, if the agreement extend to the whole of the fortune she was then intitled to, her husband will not be intitled to any personal estate which may accrue to her during the marriage.

4. However, in *Blois v. Hereford* (a), a provision by settlement was made for the wife, and no notice was taken of her personal estate; and yet a decree was made, in favour of her husband's representative, against her title by survivorship; the Lord Keeper observing that, in all cases where there was a settlement equivalent to the wife's portion, it was to be intended that the husband was to have the portion although there was no agreement for the purpose.

5. But this decision was shaken by Lords Commissioners Bathurst and Aston, in the case of *Salwey v. Salwey* (b), observing that this was a strange report. And in *Druce v. Dennison* (c) Lord Eldon said, that according to the modern cases, it is established that the settlement, to be the purchase of the wife's fortune, must either express it to be for that consideration, or the contents of the settlement altogether must import that, and plainly import it as much as if it were expressed; that such was the result of the cases upon the subject, and that it was not worth while to consider in what respect the older cases were unsatisfactory; involving inquiries not very easy to execute.

6. The case of *Salwey v. Salwey* was to this effect—The wife was intitled to a rent-charge of 300*l.* under her marriage settlement, and she having survived her first husband, took another; but previously to the second marriage a settlement was made, by which, in consideration of such in-

(a) 2 Vern. 501.

(b) Ambl. 692.

(c) 6 Ves. 395.

tended marriage, and for providing and settling a competent jointure and maintenance for her, and for making a proper provision for the children of the marriage, certain estates were conveyed to trustees for those purposes. A further settlement was made by the husband of 4000*l*. The husband died before the wife; at which time an arrear of 1098*l*. being due in respect of the rent-charge, a question arose, whether the wife was or not intitled to it? And it was determined in her favour, as having survived her husband, upon the principle that a mere settlement upon marriage was insufficient to raise a gift to the husband of his wife's personal estate, but that in order to intitle him to it there must be an agreement, either express or implied.

7. In another case (*a*) it appeared that the wife had lands of the value of 700*l*., and also 500*l*. due to her upon bond, which at the time of her marriage remained in her brother's hands. Her husband, before their marriage, made a settlement, and in consideration of a considerable fortune and portion with his then intended wife, he granted, &c., but of what particulars her fortune or portion consisted, did not appear by the settlement. The question was, whether the bond for 500*l*., being a chose in action, and not called in by the husband during his life, was assets in equity to satisfy a debt of the husband, the wife having enjoyed the benefit of the settlement made upon her out of the husband's estate, and which would have been liable to the demand? It was insisted for the creditor, that if the bond debt had been particularly mentioned as part of the consideration for the settlement, there would have been no doubt of its being assets of the husband; for in equity, the husband is a purchaser of it by making the settlement; and that there was no difference where the consideration was general of the wife's portion, especially in this case, where she had nothing but lands besides the bond for 500*l*., so that the bond

(*a*) *Heaton v. Hassell*, 4 Vin. Abr. p. 40, pl. 11.

must be taken as the consideration of the settlement (there being none other), and the rather in favour of a fair creditor, who otherwise must lose his debt, and if no settlement had been made, might have had a satisfaction out of the lands. But *per* Parker, Chancellor, "The case is so very clear that the widow's counsel need not to argue it. In this case creditors cannot be in a better condition than the executor of the debtor; and can it be imagined, that if any other person had been made executor to the husband, and such a person had filed a bill against the wife to compel her to assign this bond, that the Court would have decreed for the executor? What the law gives the husband by the intermarriage is a good consideration for making a settlement; but the husband's making a settlement does not invest in him the choses in action of his wife, unless it be expressly so agreed between the parties, and that appears to be part of the consideration of the settlement, for then the husband is a purchaser, and well intitled to them in a Court of Equity." His Lordship therefore decreed that the 500*l.* secured by the bond were not liable to the demand of the husband's creditor.

8. Again, in *Adams v. Cole* (a), the husband, having no property of his own, by an obligation given by him to trustees, reciting that his intended wife's fortune amounted to about 500*l.*, agreed to pay to her 10*l.* annually for her separate use, and that if he survived her she should have the power to dispose by will of 100*l.*, her wearing apparel, watch, rings, and jewels; but if she happened to be the survivor, then he stipulated to leave her 200*l.*, and all her wearing apparel, &c., to be at her sole disposal; and for better securing the premises, he agreed, upon request, to settle lands of the yearly value of 12*l.* The wife being intitled to a debt of 200*l.*, secured by bond given to her *dum sola*, the question was, between the surviving wife and the residuary legatee

(a) Forrester. 168.

of the husband, whether this bond debt, as a chose in action, and not reduced into possession by the husband, was the property of her, or of the residuary legatee? And Lord Talbot determined in favour of the latter.

9. It must be remarked upon the above case, that the husband settled nothing of his own, the provision was entirely out of the wife's property, and she agreed to take a part of it in certainty, rather than to run the risk of losing the whole by her husband's receipt of it during the marriage. Here, therefore, was a contract between them to divide her fortune in manner before mentioned, so that the husband became the purchaser of the bond debt for 200*l*.

10. In another case (*a*), a woman at the time of her marriage was intitled to 300*l*. as a portion, in her brother's hands, secured by his bond: a settlement of a farm was made upon her for her jointure by the husband's father and grandfather, which settlement was expressed to be made in consideration of 100*l*. paid to the grandfather as the wife's marriage portion, which was accordingly paid by the brother. Question, whether the wife, surviving her husband, was intitled to the remainder of the bond debt? And the Chancellor, on appeal from the Rolls, was of opinion in favour of the wife, unless it appeared upon a trial at law, which was directed, that the husband was intitled by agreement to the remaining 200*l*.

This case is clearly distinguishable from *Adams v. Cole*: there it appeared from the recital that the whole of the wife's fortune was the subject of agreement; here it is apparent that the husband stipulated for no more of it than 100*l*., so that it remained as if no settlement upon the wife had been made.

11. The following, although a peculiar case, still establishes what has been before stated, that contract or agreement is necessary to intitle the husband to his wife's choses

(*a*) *Cleland v. Cleland*, Pre. Ch. 63.

in action. Upon the marriage of A with B, his wife, a settlement was made in consideration of the marriage, and as well of the then present fortune and portion of B, as the covenants thereafter contained to be performed, and for settling a competent jointure upon B. One of the covenants was by C, B's mother, that she would pay to A 200*l.*, as an addition to B's fortune. The other covenant was by B's trustees, that C would, for the consideration aforesaid, during her life, or by her will, give or bequeath to her daughter B, her executors or administrators, or some child or children of B, money or lands equal to what C should give to her other children. C left her a legacy and appointed her executrix. Part of C's residuary estate came to B by lapse, and B survived A, her husband. Question, whether the surplus of C's estate that arose either by bequest under C's will, or by accidental intestacy, as by lapse, survived to the wife, or belonged to the husband? which depended upon this, whether, under the above settlement, A was to be considered as a purchaser of B's choses in action, which she might become intitled to during the marriage. Lord Hardwicke said, "The case and the settlement are very particular. The consideration is not merely the marriage and present portion, but further also the covenants contained in such settlement. If the additional 200*l.* in the first covenant had not been paid at the husband's death, his executors would be intitled to it. The other covenant is very particular, and differs from the former as to the covenantees as well as to the persons to whom to be left. Here it is not only to the wife, but also to any child of the marriage. How then can I say, that by this covenant the husband is a purchaser? The mother might have left it to the separate use of the wife, or to any children of the marriage, which would have been a performance of the covenant, so that it is not a covenant inserted for the benefit of the husband, but of the daughter, and the issue of the marriage. Since, then, she might have left it in this manner, and has left part to her daughter, and

the other part has come to the daughter by accident, and no contract to give the husband a certain right in this at all, it must be considered on the foot of a general legacy to the wife, abstracted from the contract; not such as the husband would be intitled to in all events by way of contract, but such as must go by the general rules of law and equity by survivorship, according to which, what the husband had reduced into possession will go to his executors, and the rest will survive to his wife." (a)

12. In *Burdon v. Dean* (b), the wife being intitled to 1000*l.* under her father's marriage settlement, it was prior to her marriage settled thus; 500*l.* of it were to be paid to the husband, and the residue to be settled upon herself and children. The wife being intitled to other property, no notice was taken of it in the settlement. The husband having become a bankrupt, the question was, whether she was intitled to a provision out of such other property as against the assignees, or was barred by the provision made for her by the settlement? And Lord Alvanley decided that the settlement did not bar her right to a provision out of her other property. The reason must have been, that 1000*l.*, part only of the wife's fortune, were in contemplation of the parties when the settlement was made; so that there was no contract or agreement that, in consideration of the husband's relinquishing his legal power over 500*l.*, part of such fortune, he should be intitled as a purchaser to all the residue of it, but to the 500*l.* only, remainder of the 1000*l.* to which the wife was intitled under her father's settlement as above.

13. In the case of *Lady Elibank v. Montolieu* (c), it appeared that the settlement was not intended to make the husband a purchaser of his wife's future property, the provision made in it for her being upon the expectation that from circumstances to occur in the family there would be an

(a) *Garforth v. Bradley*, 2 Ves. Sen. 675.

(b) 2 Ves. Jun. 607.

(c) 5 Ves. 737.

opportunity for doing better for her at a future period. The wife, therefore, having, after the settlement, become intitled to a considerable share of personal property, the Court ordered at her suit an additional provision to be made for her and her children.

14. In *Druce v. Denison* (a), Lord Eldon's opinion coincided with the decision of the Master of the Rolls in *Burdon v. Dean*; and his Lordship determined that a settlement by the husband, on his marriage with his wife, in the event of her surviving him, of considerable sums in government securities for her own use, with a covenant to secure to her an annuity for her life, did not intitle the husband to her choses in action to which she was then intitled, as the settlement expressed or imported no agreement that by making such provision he should have them; consequently, they survived to her, outliving her husband. But he having by his will made bequests in her favour, and treated her choses in action as his own, and bequeathed them as such, as appeared from his books and certain papers which were given and admitted in evidence, the question terminated in that of election, so as to put the widow to elect whether she would give up her choses in action and take under the will, or whether she would surrender her benefits under that instrument, and retain her own property.

15. Another case upon this subject is *Mitford v. Mitford* (b): there it appeared from the settlement, that the wife had given up to her husband a considerable part of her fortune, who in consideration of such fortune covenanted to make a provision for his wife and children: and Sir William Grant said, (what has been proved by the above authorities,) that the mere fact of a settlement is not evidence that the husband became a purchaser of all the fortune that might afterwards come to the wife; that the settlement in that case appeared to be in consideration of her fortune as specified and described in the deed itself, part of which was

(a) 6 Ves. 385.

(b) 9 Ves. 89.

settled and part paid to the husband, so that he could not be considered a purchaser of anything more than the fortune she then had.

16. Consistently with this doctrine, his Honour decided the case of *Carr v. Taylor* (a): there the consideration of the settlement was expressed to be the portion or fortune which the husband would have or receive upon his marriage. The wife afterwards became intitled to a share in the residuary estate of an intestate, part of which consisted of a bond debt due from the husband and his father. The husband having become a bankrupt, the question was, whether the wife was intitled to an additional settlement out of the property accrued to her after the date of her marriage settlement; which could not be, if, by such settlement, the husband had purchased for his own benefit all subsequent property to which his wife might become intitled during the marriage. The Master of the Rolls decided, that as the settlement might be construed to mean either the fortune which the husband would actually receive at the moment of the marriage, or the rights he would acquire by the marriage, and as the latter intention was neither expressed nor clearly imported in such settlement, its operation should be confined to the wife's property at her marriage; so that her husband was not a purchaser of her after-acquired personalty, and consequently that she was intitled against his assignees to an additional settlement out of it.

17. From the above cases Mr. Roper deduces the following propositions (b): —

First, That a settlement made before marriage in consideration of the wife's fortune, without saying more, intitles the husband to all her then personal property, and not to such which afterwards accrues to her.

(a) 10 Ves. 574: see *Beresford v. broke*, 2 Ves. Sen. 591: see also *Hobson*, 1 Madd. 371: also the older *Farrer v. Grant*, 7 Law J. Chan. cases upon this subject, *Adams v. 95*: and *Corsbie v. Free*, 1 Cr. & *Pierce*, 3 P. W. 11: *March v. Head*, Ph^{ca} 72.
3 Atk. 720: and *Tomkyns v. Lad-* (b) 1 Rep. H. & W. 298.

Secondly, That if a part of her fortune only appear to be stipulated for, the residue which she then has, or what may afterwards accrue to her, will not belong to the husband.

Thirdly, But when it appears from the settlement, that it was the agreement between the parties that he should not only have his wife's then present, but all her subsequently-acquired personal estate, he will in such cases be intitled to the whole under the marriage contract.

And lastly, that, in instances where any of the wife's choses in action are not purchased by the husband by settlement, they will be subject to her rights of survivorship, and of provision by settlement, which have been before considered.

18. It is presumed that the Court will not take into consideration whether the settlement made by the husband is or is not adequate to the wife's fortune. (a)

19. It must, however, be noticed, that when the husband is a purchaser by settlement of his wife's choses in action, if the provision for his wife and children be executory, *i. e.* resting upon his covenant, then neither he nor his assignees will be intitled to recover them in equity until they have specifically performed the stipulations in the settlement. (b)

20. If, however, the covenant be future and contingent, as that his executors should, after his death, if his wife survived him, pay to her a sum of money, there, as the act to be done in performance of the covenant is contingent and may never happen, and his right to her choses in action by purchase under the settlement is immediate and absolute, the Court cannot postpone his title to receive them until he perform such an act as he engaged to do by such a covenant. (c)

21. But when the husband's covenant to pay or settle amounts to a present and certain obligation, as to do the act

(a) *Lannoy v. Athol*, 2 Atk. 448. *v. Corrie*, 2 Vern. 190: *Holt v. Holt*,

(b) *Pyke v. Pyke*, 1 Ves. Sen. 2 P. W. 648.

376: and see *Lister v. Lister*, 2 (c) *Basevi v. Serra*, 14 Ves. 313; Vern. 68; 2 Freem. 102: *Howman* 3 Mer. 674.

immediately, or at a fixed period, then the wife has a lien upon her own property for the consideration agreed to be given by the husband for its purchase, which must be paid or settled before the Court will take from her such property. (a)

22. And this will be the case where the covenant to pay is future or conditional, if the time is arrived when it is to be performed. (b)

SECTION II.

OF THE VALIDITY OF ANTENUPTIAL SETTLEMENTS AGAINST CREDITORS AND PURCHASERS, AS CONNECTED WITH THE HUSBAND'S TITLE AS A PURCHASER OF HIS WIFE'S PROPERTY.

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| <p>2. <i>Valid against creditors and purchasers.</i></p> <p>4. <i>Unless where fraud.</i></p> <p>5. <i>Void under 27 Eliz. against purchasers for valuable consideration where general power of revocation reserved.</i></p> <p>6. <i>Statute does not extend to personal estate.</i></p> <p>7. <i>What will be valuable consideration within act.</i></p> | <p>8. <i>Void where power of revocation with consent of other persons if under control of settlor.</i></p> <p>9. <i>Valid if consent required of persons not under control of settler.</i></p> <p>10. <i>Or though powers reserved to charge estate.</i></p> <p>11. <i>Unless where such powers are reserved by fraud.</i></p> |
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1. We shall now proceed to the subject of the validity of antenuptial settlements against creditors and purchasers. This is a point which materially concerns the husband's title which has been considered in the preceding section, for if the provision made by the husband be taken away from his wife, his title as a purchaser to her equitable property must fail, and her rights in her own choses in action will remain

(a) *Mitford v. Mitford*, 9 Ves. 96.

(b) *Corsbie v. Free*, 1 Cr. & Ph. 64.

the same, in regard to him, as if no such settlement had been made.

14 L J R 352.

2. With respect to the validity of antenuptial settlements against creditors, &c., it is established that a settlement, *bond fide* made before and in contemplation of marriage, is good not only against the husband, but against his creditors and subsequent purchasers.

3. The efficacy of the consideration of marriage is strongly demonstrated in the following case: — A, previously to and in contemplation of his marriage with B, and in order to make a provision for himself and wife, and with a view of withdrawing out of the reach of his creditors a considerable part of his property, transferred at various times before the marriage into her name several sums of stock, and invested monies in her name; all which, as it was stated in the bill, were not his own property, but that of other persons who had employed him as a stockbroker, and that the fact was well known to B. The marriage took place in the year 1805, and between that year and 1802 preceding, various deeds and settlements were executed by A in favour of B, containing (as it was alleged) false statements of property belonging to B (which in fact never did belong to her), with the intent to defeat the husband's creditors; and with the like view, sums in stock, amounting to 6200*l.* annuities, were, in the settlement made shortly before the marriage, recited, contrary to the truth, as belonging to her, and the same with other property were settled to her separate use for life, with an absolute power of disposition. B having survived her husband, his creditors attempted to defeat the above transactions and settlement upon the ground of fraud, but which was not proved, and was denied by B. Sir William Grant, M. R., decided against the creditors, because it was immaterial whether the stock was, as recited, purchased with the wife's money or not; for, if it were the husband's, he had a right to settle it in contemplation of marriage, which settlement could not be defeated by his creditors; and that the fact

of his being indebted at the time, and of B's knowing it, would not affect the validity of the settlements: and his Honour thought, that the mis-recital of the property being the wife's when it was her husband's did not necessarily imply fraud, since he might choose to adopt that mode in giving her the property. (a)

4. Fraud, however, will vitiate an antenuptial settlement. (b)

5. The statute of the 27th of Elizabeth (c) avoids conveyances of lands, tenements, and hereditaments against subsequent purchasers for a valuable consideration, when a general power of revocation is reserved to the settlor. And it was holden in *St. Saviour's case* (d), that notwithstanding the consideration of marriage was a good consideration, yet if a power of revocation were annexed to the settlement, it was void against strangers. Hence it appears, that if such a power be contained in an antenuptial settlement of real property, it will be void against a subsequent purchaser; and the effect will be the same, although the husband had released or extinguished his power before he made the subsequent sale. (e)

6. But the statute merely extends to "lands, tenements, and hereditaments," and not to personal estate. (f)

7. The valuable consideration mentioned in the act need not to be money. If, therefore, a person give up a right which he had for the property, such surrender would be a valuable consideration within the statute. (g)

8. When the power of revocation is not general and un-

(a) *Campion v. Cotton*, 17 Ves. 263.

(b) See *ex parte Mayor*, Mont. Rep. 292.

(c) Cap. 4. sect. 5.

(d) *Lane*, 21, 22.

(e) 3 Rep. 83; and *Bullock v. Thorne*, Moor's Rep. 617, S. P.

(f) *Bill v. Cureton*, 2 M. & K. 512.

(g) *Hill v. Bishop of Exeter*, 2 Taunt. 69—83: and *Ward v. Shallet*, 2 Ves. Sen. 17. As to the persons who are considered purchasers so as to be intitled to the benefit of this statute, see Sugden on Powers, chap. 13, sec. 9. 7th ed.

qualified, but the exercise of it is made to depend upon the consent of other persons, then if such persons be in the interest or under the control of the settlor, the settlement will be void against a subsequent purchaser, as in *Lavender v. Blackstone*. (a) There the husband reserved to himself a power to make leases of all or any part of the premises, with the consent of A and B, trustees of his own nomination, for any number of years, with or without rent; and the Court held the reservation to be fraudulent, by enabling him to defeat the settlement *in toto*; the restriction being nothing, as the trustees were of the settlor's own appointment, and therefore to be presumed to act according to his wishes. (b)

9. But if the exercise of the power be made to depend upon the consent of persons not in the interest or under the control of the settlor, the settlement will be valid against a subsequent purchaser, as it was determined in *Buller v. Waterhouse* (c); because such a case is not considered within the meaning of the statute, the settlor not having the sole power of defrauding the purchaser by the exercise of the prior reserved power. Hence the usual powers in settlements to revoke the uses or trusts of the lands, for the purposes of sale and exchange, with a direction that the money should be paid to the trustees to be reinvested (d), will not avoid the settlement against a subsequent purchaser of the husband.

10. Neither are powers *bonâ fide* reserved to charge sums of money upon the estate within the letter or meaning of the statute. (e)

11. We must except, however, such powers of charging, &c. as are reserved fraudulently, as when the husband retains or reserves to himself so large an interest or power over the property as to show the motive of the transaction

(a) 2 Lev. 146.

(d) *Doe v. Martin*, 4 Term Rep.

(b) See *Griffin v. Stanhope*, Cro.

39.

Jac. 454.

(e) *Jenkins v. Keymis*, 1 Lev.

(c) 3 Keb. 751: *Jones*, 94: see 150—152.

Hungerford v. Earle, 2 Freem. 120.

to have been to defeat creditors or purchasers, for in such cases those powers will be considered as amounting in effect to a power of revocation, and therefore invalidate the settlements containing them. (a)

12. Thus, in *Tarback v. Marbury* (b), the defendant having reserved to himself a power during his life to grant, alien, or otherwise dispose, at his will and pleasure, of the estate comprised in the deed; the Court held that, as the defendant might have *charged* it to the *full value*, the reservation amounted in effect to a power of revocation, and therefore that the settlement was fraudulent.

13. But it appears from the case of *Jenkins v. Keynis* (c), which has been before referred to, that if such a power to charge the property be fairly reserved, and from the magnitude of the sum when compared with the value of the estate no presumption of fraud arises, it will not defeat the settlement at the instance of the purchaser.

(a) 3 Keb. 527 : 1 Atk. 16.

(c) 1 Lev. 150—152.

(b) 2 Vern. 510

SECTION III.

WHETHER SETTLEMENTS MADE AFTER MARRIAGE WILL
RENDER THE HUSBAND A PURCHASER OF HIS WIFE'S CHOSSES
IN ACTION.

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| <hr/> 1. <i>Husband not a purchaser of wife's fortune by postnuptial settlement.</i>
3. <i>Sykes v. Meynal.</i>
4. <i>Mr. Jacob's remarks thereon.</i> | <hr/> 7. <i>Why postnuptial settlements not binding on wife.</i>
8. <i>Wife may contract with husband where she has separate property.</i> <hr/> |
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1. THE settlements which have been under consideration were those only that were made previously to marriage, at a period when the parties were able to contract with each other. If, then, as it has been shown, actual agreement or contract be necessary to give to the husband his wife's choses in action, in consideration of the provision made by him for her, it appears to be a necessary consequence, that a settlement made after the marriage by the husband upon his wife, even upon an accession of fortune to her (not given to her separate use and disposition) where the transaction is between themselves only, and the Court does not act for the wife, will not constitute the husband a purchaser of such additional fortune, but the wife's title by survivorship will prevail.

2. Thus, in *Lannoy v. Duke and Duchess of Athol* (a), it appeared that the husband, by second settlement, made during the marriage, in consideration of a large sum of money to which the wife became intitled upon her father's death, in addition to securing a rent-charge to her included

(a) 2 Atk. 448, ed. by Sanders.

in the first settlement, provided 6000*l.* for the portions of daughters in default of issue male, so that there was no provision for the wife other than what she was intitled to under the first settlement. The wife having survived her husband, the question was, whether the second settlement intitled his representatives to the accessional fortune of the wife? And Lord Hardwicke decided that it did not: first, because there was in fact no additional provision made for her by it, and that the portions for daughters had nothing to do with the general rule of a settlement equivalent to the fortune the father had with the mother; and, secondly, and chiefly, as his Lordship expressed himself, because there was no contract on the part of the wife, who was herself incapable of contracting, and had neither father nor guardian to contract for her. (a)

3. However, in *Sykes v. Meynal* (b), where the second husband, after marriage, made a settlement upon his wife, Sir Thomas Clarke decreed, that her husband was intitled by it to a mortgage debt owing to her, and not reduced into possession during his life, although she was the survivor.

4. But upon this case, Mr. Jacob remarks (c): "The wife was intitled to a mortgage under the will of her first husband. Her second husband, after the marriage, settled on her for life, by way of jointure, lands valued at 400*l.* per annum. The settlement was recited to be in consideration of the marriage, of his love and affection for her, and of a marriage settlement previously made of lands belonging to her, and of a very considerable fortune had and received by him with her in monies and securities for money. After

(a) It does not, however, appear that the sanction of the wife's father, guardian, or trustee could give any additional effect to the settlement as against her in the event of her surviving, *Stamper v. Barker*, 5 Madd. 157.

(b) 1 Dick. 368.; Reg. Lib. B, 1762, fo. 440.: the decree is entered under the name of *Sykes v. Holden*.

(c) 1 Rep. H. & W. 304 n.

his death she entered upon the jointure lands, and she and her third husband continued in the possession of them. The circumstance that the wife enjoyed the jointure expressed to be made in consideration of her fortune, distinguishes this case from that of *Lannoy v. Duke of Athol*, where no additional provision was made for her. The wife electing after her husband's death to accept benefits given by the settlement, is of course bound to confirm it in other respects."

5. It is therefore presumed that, notwithstanding *Sykes v. Meynal*, a settlement after marriage will not bind the wife, or intitle her husband to her choses in action, unless such settlement be confirmed by her after her husband's death, or unless it be confirmed under a decree in equity during his life, or another settlement directed and approved of.

6. In *Sykes v. Meynal*, his Honour referred to two cases as warranting the decree: one of them was that of *Lannoy v. Athol*, which has been just stated, but which it is presumed has a contrary tendency. The other case was *Jones v. Marsh (a)*, which seems to be equally inapplicable, the question in it being not whether the wife could contract with her husband to pass to him her choses in action, but whether a settlement upon her in consideration of an additional fortune coming to her from her mother, was or was not valid against subsequent creditors of the husband.

7. The ground upon which settlements after marriage are not binding upon the wife, is the general principle that, considering the relation between man and wife, and the opportunities which he has of practising upon her affection and fears, so as to take undue advantage, the law throws around her a shield of protection, and disables her from contracting personally with him relative to her property, except according to the forms which it has prescribed. (*b*)

(*a*) *Forrest*. 64.

(*b*) *See 2 Ves. Sen.* 17.

8. This doctrine, however, must be confined to cases where the wife is not placed in the character of a feme sole in relation to her property, for in that character (as it will be afterwards shown) she may dispose of it as she thinks proper, and contract concerning it with her husband, for his or her benefit, as she pleases.

To such the wife's power only, it is presumed that Lord Eldon's observation in *Lady Arundell v. Phipps* (a) applies. In this case his Lordship, alluding to that of *Dewey v. Bayntun* (b), said, "From the only account I have had of this case, it appears to have been asserted that a husband and wife could not, after marriage, contract for a *bonâ fide* and valuable consideration for a transfer of property from him to her or trustees for her. The doctrine is not so either here or at law." The contract in both cases was a purchase by the wife with her separate property, or over which she had a sole and separate power of disposition, of ancient pictures, furniture, and other articles of great value belonging to her husband; and it was on the question as to its validity against the husband's creditors, that Lord Eldon thus expressed himself.

(a) 10 Ves. 148.

(b) 6 East, 257.

CHAPTER II.

OF THE WIFE'S RIGHTS AGAINST HER HUSBAND'S CREDITORS,
WHERE HE HAS MADE A SETTLEMENT UPON HER AFTER
MARRIAGE.

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| <ol style="list-style-type: none"> 1. <i>Postnuptial settlement binding on husband.</i> 2. <i>And against creditors, if in pursuance of articles before marriage.</i> 3. <i>Effect where made in pursuance of verbal agreement before marriage: Mr. Roper's opinion.</i> 4. <i>Mr. Jacob's remarks.</i> 5. <i>Where husband fraudulently prevents agreement from being in writing.</i> 6. <i>Agreement founded on letters or notes.</i> 7. <i>Postnuptial settlement void against purchasers for value even with notice.</i> 9. <i>Only void against creditors where fraudulent.</i> 10. <i>Debts due at time of settlement presumption of fraud.</i> 11. <i>Debts subsequently incurred will not defeat postnuptial settlement.</i> 12. <i>Recital in postnuptial settlement of antenuptial articles whether binding on creditors.</i> 13. <i>Settlement void against creditors where debts considerable.</i> 14. <i>Not where of small amount.</i> 15. <i>Lush v. Wilkinson.</i> 16. <i>Townsend v. Westacott: rule laid down by Lord Langdale.</i> 7. <i>Settlement not void where, though considerable debts due, they are secured.</i> | <ol style="list-style-type: none"> 18. <i>Or where their payment is provided for.</i> 19. <i>Rights of subsequent creditors against voluntary settlement.</i> 20. <i>Mr. Jacob's remarks.</i> 21. <i>Rule laid down by V.-C. Knight Bruce.</i> 22. <i>Whether settlement merely of stock liable to creditors.</i> 23. <i>Mr. Roper's opinion.</i> 24. <i>Mr. Jacob's observations.</i> 27. <i>Effect of such settlement where settlor insolvent.</i> 28. <i>Norcutt v. Dodd.</i> 29. <i>Postnuptial settlement defeated where debts contingent only.</i> 30. <i>Good against settlor and volunteers.</i> 31. <i>Void if made in contemplation of contracting debts.</i> 32. <i>Effect of reservation of general power of revocation.</i> 33. <i>Or power over fund.</i> 35. <i>Settlement void where settlor continues in possession, unless possession consistent.</i> 38. <i>Where possession apparently consistent by fraud.</i> 40. <i>Where postnuptial settlements valid against creditors and purchasers on ground of valuable consideration.</i> 41. <i>Settlements made by Court of Chancery.</i> 42. <i>Where money paid on wife's behalf.</i> 43. <i>Or secured to be paid.</i> |
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| 44. <i>Where whole of wife's property settled and husband settles nothing.</i>
45. <i>Accession of fortune to wife good consideration to support settlement.</i>
46. <i>But settlement must not greatly exceed wife's fortune.</i>
47. <i>Relinquishment of valuable interest by wife will be consideration.</i> | 48. <i>As her jointure.</i>
49. <i>Or dower.</i>
50. <i>Where voluntary settlement may become binding upon creditors.</i>
51. <i>Gift or charge by wife of separate property good consideration.</i>
53. <i>If in proportion to settlement.</i>
54. <i>Which if court cannot determine must be left to jury.</i> |
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1. A settlement made by the husband *after* the marriage upon his wife and children is obligatory upon himself, and all persons claiming as volunteers from or through him. (*a*)

2. It is scarcely necessary to observe, that when the settlement is made after, but in pursuance of written articles entered into before the marriage, such settlement is unimpeachable by any persons, whether they be creditors or subsequent purchasers; for the contract of marriage is a valuable consideration, and establishes the settlement against every one. (*b*)

3. But if the agreement before marriage be verbal only, and the settlement after marriage be made in pursuance of it, whether such agreement will support the settlement against creditors appears to be undecided. Mr. Roper considers (*c*) that such a promise would not support the settlement against creditors, because the statute of frauds is express, that no action shall be brought whereby to charge any person upon any agreement made in consideration of marriage, unless some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorised. (*d*) Against which enactment he conceives, that the doctrine of part per-

(*a*) *Watts v. Bullas*, 1 P. W. 60 :
Brookbank v. Brookbank, 1 Eq. Ca.
Ab. 168, pl. 7 : *Bale v. Newton*, 1
Vern. 464.

(*b*) *Bovye's case*, 1 Ventr. 193.
(*c*) 1 Rop. H. & W. 307.
(*d*) 29 Ch. 2. c. 3. s. 4.

formance by the subsequent marriage could not be admitted to take the case out of the statute. (a)

Such, he adds, appear to have been the opinions of Lord Thurlow and Sir William Grant, in *Dundas v. Dutens* (b), and *Randall v. Morgan*. (c)

4. Mr. Jacob remarks upon this point: "In *Dundas v. Dutens*, however, according to Mr. Cox's report, Lord Thurlow was clearly of opinion, that a settlement made after marriage, in pursuance of a parol agreement before the marriage, was not to be reckoned fraudulent against creditors. (d) In *Dawson v. Ellis* (e), it was argued that if a man first contracts verbally to sell his estate to A, and then contracts in writing to sell it to B, and afterwards conveys it to A, in pursuance of the first contract, A having at that time notice of the second contract, B would not be able to call on A for a conveyance. It was contended that the statute of frauds did not nullify the verbal contract, but only took away the remedy for enforcing it; that it might therefore still be used for the purpose of defence; and that the circumstance of the second agreement being in writing gave it no superior equity over the first, when the legal estate had been conveyed in pursuance of it. This reasoning was sanctioned by the Master of the Rolls: it derives support from analogy to the construction put upon the statute of limitations, which, though barring the remedy, leaves the debt subsisting for some purposes; and also from the rule hitherto prevailing, that in cases within the statute of frauds, as well as in those within the statute of limitations, relief may be given, unless the objection be insisted on in the pleadings: if a verbal contract were merely void, it could not be the foundation of a decree. Since, however, it is now considered that the statute of limitations (f), and as it seems the statute of frauds (g),

(a) 1 Ves. J. 199: 3 Bro. C. C. 401.

(e) 1 Jac. & Walk. 524.

(b) 1 Ves. Jun. 196: 2 Cox. 235.

(f) *Foster v. Hodgson*, 19 Ves. 180.

(c) 12 Ves. 67.

(g) *Redding v. Wilkes*, 3 Bro. C. C.

(d) See also 1 Strange, 237: 4 400: *Rist v. Hobson*, 1 Sim. & Stu. East, 207. 543.

may be taken advantage of by demurrer, it is perhaps doubtful whether this rule will be followed in all cases; for no relief can in general be given at the hearing when the bill is open to a demurrer on the merits as stated in it. And the tendency of late decisions has been to treat verbal contracts as void for all purposes, whether the parties do or do not object. (a) In a recent case it appeared that a verbal contract was entered into for the sale of the next presentation to a living then full; but it was not reduced in writing until after a vacancy had occurred by the resignation of the incumbent; the question was whether the transaction was affected with simony; and the Lord Chancellor said that it clearly could not stand, if there was no binding contract at the time when the vacancy occurred, and therefore declined to enforce it. (b)"

5. If the husband has been guilty of fraud, and the case does not merely rest on the parol promise, the fraud will take the case out of the statute, and then the settlement will be obligatory (c); as if the husband secretly countermanded the instructions which he had given for drawing a settlement, and then induced his wife to marry him. (d)

6. When the agreement before marriage rests upon letters or notes, the terms and obligations of the parties must appear from them, so as to manifest their intention: this appears from the case of *Randal v. Morgan*, before referred to, and the cases there collected.

7. But when the settlement is after the marriage, and it is expressed to be made in consideration of the marriage only, the contract of marriage, being completed, ceases to be

(a) *Rose v. Cunnyngame*, 11 Ves. 550: see *Buckmaster v. Harrop*, 7 Ves. 341; 13 Ves. 456: *Gaskarth v. Lowther*, 12 Ves. 107.

(b) *Marquis Townshend v. Bishop of Norwich*, 17th Aug. 1821; Reg. Lib. B. 1820, fo. 1791.

(c) *Montacute v. Maxwell*, 1 P. W. 620; 1 Stra. 236; Prec. in Ch. 526.

(d) 1 Eq. Ca. Ab. 20, pl. 4: Ch. Pre. 526; 1 Ves. Jun. 199: 2 Bro C. C. 565.

a valuable consideration ; such a settlement then is merely voluntary, although the consideration is moral and meritorious. Against purchasers, therefore, such a settlement is absolutely void, whether they had or had not notice of it at the time of their purchases ; for the statute of the 27 Eliz., c. 4, makes all voluntary settlements null and void against purchasers for a valuable consideration ; at least the cases have decided that it has such an effect. (a)

8. Thus, in *Buckle v. Mitchell* (b), A made a voluntary settlement of an impropriate rectory upon his sister B, and her children ; A afterwards agreed to sell to C, for a valuable consideration, some of the tithes belonging to it, but died before the contract was completed ; C therefore filed his bill for a specific performance against the persons claiming under the settlement. C had notice of the settlement at the time the agreement was made ; nevertheless the Court decreed a performance of the contract, upon the principle that under the act of the 27 Eliz., the settlement was absolutely void against C, a purchaser for valuable consideration. (c)

9. The act of the 13 Eliz., c. 5, does not make void voluntary settlements against creditors, but merely declares that a fraudulent deed shall be void against them. (d)

10. Hence it seems to follow, that although a man be indebted at the time he made a voluntary settlement, yet it is no further void, on that account, than as affording a presumption of fraud. (e)

(a) *Gooch's case*, 5 Rep. 60 b. : Cowp. 710 : *Evelyn v. Templar*, 2 Bro. C. C. 148 : *Humphreys v. Moses*, 2 Blackst. Rep. 1019 : *Currie v. Nind*, 1 M. & C. 25.

(b) 18 Ves. Jun. 100 : see also *Otley v. Manning*, 9 East, 59, where all the cases are considered by Lord Ellenborough : and *Pulvertoft v. Pulvertoft*, 18 Ves. 84.

(c) In a subsequent case, *Smith v. Garland*, 2 Mer. 123, it was held

that the party who had made a voluntary settlement was not intitled to the assistance of a court of equity to compel the performance of a contract subsequently entered into by him for the sale of the estate ; see *Johnson v. Legard*, Turn. & Russ. 281 : and 3 Sugden on Vendors and Purchasers, p. 304, 10th ed.

(d) *Gale v. Williams*, 8 Mees. & Wels. 405.

(e) 1 Atk. 15 : *Lord Teynham v.*

This principle will serve as a guide to the understanding of the cases, and the distinctions which have been made ; the conclusions to be drawn from which will be shortly stated.

11. If the husband, when he makes the settlement after marriage upon his wife, be not indebted at the time, subsequent debts will not defeat it : upon this point Lord Hardwicke, in *Townshend v. Windham* (a), thus expressed himself: "If there be a voluntary conveyance of real estate or chattel interest by one not indebted at the time, although he afterwards becomes indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud subsequent creditors, that will be good (b) ; but if any mark of fraud, collusion, or intent to deceive subsequent creditors appears, that will make it void, otherwise not ; but it will stand, though afterwards he becomes indebted." (c)

12. Upon this principle, Sir Thomas Plumer, M. R., decided the case of *Battersbee v. Farrington* (d), his Honour observing, that a voluntary conveyance by a person not indebted, was clearly good against future creditors. In that case the settlement contained a recital that it was made in pursuance of articles entered into before the marriage, but they were lost ; and whether the recital would be evidence against creditors, so as to establish the deed against them, was considered by his Honour, who stated the distinction to be, that against all persons claiming under the settlor, the recital was conclusive (e) ; but that it would be difficult to maintain that a recital in a postnuptial settlement of antenuptial articles, of the existence of which there

Mullins, 1 Mod. 119 : 2 Ves. Sen. 10 : see also *Partridge v. Gopp*, 1 Eden, 163—166 ; and *Holloway v. Millard*, 1 Madd. 414—419 : *Richardson v. Horton*, 13 Law J. N. S. Chan. 186.

(a) 2 Ves. Sen. 11.

(b) 1 Atk. 93 : *Middlecome v. Marlow*, 2 Atk. 519 : 2 Bro. C. C. 90.

(c) 12 Ves. Jun. 155.

(d) 1 Swanst. 106—113.

(e) See Willes's Rep. 11, 12.

was no distinct proof, would be binding upon creditors; for that such a doctrine would give to every trader a power of excluding his creditors, by a recital in a deed to which they were not parties. (a)

13. Where the husband happens to be indebted at the time of making the settlement, if his debts be considerable (b), and the effect of the settlement would be, if substantiated, to defeat the creditors of their demands, then such settlement is void as fraudulent, under the act of the 13th of Elizabeth. (c)

14. But it would not be so, it is presumed, if the debts were of inconsiderable amount; because their existence furnishes no presumption of the settlement having been made with an intent to deceive and defraud creditors; and common sense would revolt at a decision that a voluntary settlement made by a husband having a rental of 5000*l.* a year, should be void, if it happened that when he made such settlement he was indebted in the trifling sum of 100*l.*

15. This point came under Lord Alvanley's consideration in *Lush v. Wilkinson*. (d) In that case, the husband, at the period of making the settlement, was indebted in two sums, secured by mortgages, and in about 100*l.* and no more, as appeared from the wife's answer; as also that none of such debts were owing at his death, and that he was neither insolvent when he made the settlement, nor at his decease. This settlement was attempted to be impeached by a subsequent creditor, upon the ground of its being voluntary, and therefore void against creditors, the bill charging insolvency in the husband at that time, and that he was then indebted to several persons; but which statements were negatived by the widow, except to the extent above men-

(a) See Anon. Prec. in Ch. 101 :
Wilson v. Pack, *ibid.* 297.

(d) 5 Ves. 384 : see also 1 Madd.
 Rep. 421.

(b) *Twine's case*, 3 Rep. 81 *b.*

(c) *Beaumont v. Thorp*, 1 Ves.
 Sen. 27.

tioned. His Honour said, that in order for a subsequent creditor to obtain a reference for inquiry into prior debts, for the purpose of invalidating a voluntary settlement, he doubted whether such a reference ought to be made, except upon proof of one antecedent debt; and he further observed that in *Stephens v. Olive*, Lord Kenyon seemed to think that without an antecedent debt proved, there was no such right; that a single debt would not do, since every man must be indebted for the common bills of his house, although he pay them every week, and that the validity of the settlement must depend upon this, viz. whether the settlor were in insolvent circumstances at the time. The creditor's bill was dismissed.

16. So, in *Townsend v. Westacott (a)*, where a voluntary settlement, made by a person, who, at the time of making it, was largely indebted, and who, within three years, became an insolvent, was set aside, Lord Langdale, M. R., remarked that there had been a little exaggeration in the arguments on both sides, as to the principle on which the Court acted in such cases; on one side it had been assumed that the existence of any debts at the time of the execution of the deed would be such evidence of a fraudulent intention as to induce the Court to set aside a voluntary conveyance, and oblige the Court to do so under the statute of Elizabeth. He did not think that the just construction of the statute warranted that proposition, because there was scarcely any man who could avoid being indebted to some amount, he might intend to pay every debt as soon as it was contracted, and constantly use his best endeavours, and have ample means to do so, and yet might be frequently, if not always,

(a) 2 Beav. 340: 4 Beav. 58: see also *Shears v. Rogers*, 3 B. & Ad. 362: *Norcutt v. Dodd*, 1 Cr. & Ph. 103: *Lister v. Turner*, 15 Law J. N. S. Chan. 336. In *Cullen v. Sanger*, 2 You. & Jer. 459, it was held that the insolvency mentioned in the bankrupt act, 6 Geo. 4. c. 16, must mean a total insolvency, such as a general inability to pay debts in the ordinary course of trade.

indebted in some small sum: there might be a withholding of claims contrary to his intention, by which he was kept indebted in spite of himself; it would be idle to allege this as the least foundation for assuming fraud or any bad intention. On the other hand, it was said that something amounting to insolvency must be proved to set aside a voluntary conveyance: this, too, was inconsistent with the principle of the act, and with the judgment of the most eminent judges.

17. Where the husband is considerably indebted when he makes the settlement, if such debts be firmly secured, as upon mortgages, the mere fact of his being indebted will not vitiate the settlement; because the payment of the debts then owing having been duly provided for, so as not to be evaded in any manner by the husband, the mere circumstance of their being in existence, and unsatisfied at the date of the settlement, raises no presumption whatever that such settlement was made to evade or prevent the discharge of them. (a)

18. So also, when the presumption of fraud, which arises from the fact of the settlor being largely indebted, is repelled by the settlement itself providing for the payment of the debts, such settlement will be good against subsequent creditors. (b)

19. Upon the subject of the rights of *subsequent* creditors against the voluntary settlement, Sir William Grant, in *Kidney v. Coussmaker* (c), thus expressed himself: "Although there has been much controversy, and a variety of decision, upon the question whether such a settlement be fraudulent as to any creditors except such as were creditors at the time, I am disposed to follow the latest decision, that of *Montague v. Lord Sandwich* (d), which is,

(a) 2 B. C. C. 90. 92: see also 1 Madd. 418.

(b) 9 Ves. 194: *Nann v. Wilsmore*, 8 T. R. 521.

(c) 12 Ves. 136—155.

(d) 12 Ves. 148.

that the settlement is fraudulent only as against such creditors as were creditors at the time."

20. "This," so Mr. Jacob observes, "must probably be understood to mean that subsequent debts will not invalidate the settlement, where it does not appear from other circumstances that the intention was fraudulent; for the authorities seem to establish that a voluntary settlement may be invalidated as well upon evidence indicating a fraudulent object, as upon evidence of debts existing at the time, and that if it be found to be invalid upon either ground, the subsequent creditors are let in to share the benefit of the decree. (a) In *Lush v. Wilkinson* (b), it was doubted whether subsequent creditors could file the bill for the purpose of impeaching the settlement, but if they are intitled to participate in the property in the event of the settlement being found to be fraudulent, there seems no reason against their asserting this right as plaintiffs: and accordingly, in *Richard v. Smallwood* (c), where the plaintiff had, subsequently to the date of the settlement, become a creditor by recovering damages for breach of a covenant in a lease previously granted to him by the settlor; the suit was entertained. In that case Sir T. Plumer, M. R., observed that the statute declared the deed void as against those creditors whose actions, &c. were or might be hindered or delayed, and that created a question how far it applied to subsequent creditors: he did not recollect any instance of validity being given to a settlement where the party was largely indebted at the time, and subsequent creditors had applied for relief. All the cases said that the deed would stand, if the party was not indebted, and if it was not fraudulent. Being indebted was only one circumstance from

(a) *Walker v. Burrowes*, 1 Atk. and sec 2 Ves. Sen. 10: 2 Atk. 481, 93: *Fitzer v. Fitzer*, 2 Atk. 511: *post.*
Taylor v. Jones, *ibid.* 600: Mon- (b) 5 Ves. 384.
tague v. Sandwich, 12 Ves. 156 n.: (c) *Jac.* 552.'

which evidence of the intention might be drawn. But suppose a person indebted, to execute a conveyance, such that if those who were creditors at the time complained, it would be void as against them: then if they were paid off and a new set of creditors stood in their places, would that make any difference? Did it not hinder and delay them, and was it not void as against them? If not, it would be easy to evade the statute: the party might pay off those to whom he was then indebted by borrowing of others. If the conveyance could not be invalidated on the ground of the debts alone, the question would be whether it was made for the purpose of defrauding creditors. No doubt, if the party was not indebted at the time, the onus of proving the fraud was thrown on the other side, for he might fairly intend to give away his property; but still it might be fraudulent, as contemplating future debts. His Honour afterwards in giving judgment remarked, that if it was shown that the deed was one which, as against any of the creditors, could not stand, then the property became assets, and was applicable to the payment of debts generally: all the creditors would come in at whatever times their debts might have arisen: that was decided. His Honour was strongly inclined to consider the settlement fraudulent, but directed a preliminary inquiry as to the debts due at the time of its execution."

21. However, in the late case of *Ede v. Knowles* (a), Sir J. L. K. Bruce, V.C., seems to have considered that a deed could only be set aside as fraudulent against creditors at the instance of a person who was a creditor at the time, though, when it should have been set aside, subsequent creditors would be let in.

22. When the settlement contains property merely which is not liable to the demands of creditors at law, as stock in the public funds, the question arises whether such

(a) 2 Y. & C. C. C. 178; *S. C. Elliotson v. Knowles*, 6 Jur. 549.

a settlement can be impeached by any of the settlor's creditors.

23. Mr. Roper (*a*) argues in favour of the creditors, that since, in the administration of assets, stock is subjected to the payment of debts by circuitry, probably by the like mode or analogy, it may be effected in the present instance. "Thus," he says, "the statutes creating stock require a will disposing of it to be attested by two witnesses; and if it be not so attested, they give it to the executor; who, as executor, is held to take the stock, subject to all the demands affecting the testator's personal estate in general, consequently liable to the payment of his debts. May it not then be urged, in analogy to this, that as the husband, by the settlement, has altered the nature of the fund, and by vesting it in trustees converted it into equitable property, it shall therefore, in their hands, be liable in the first place to the just demands of the settlor's creditors, and that to effectuate such purpose, the moment the fund becomes equitable, it shall be considered as bound to answer, with his other property, his *bonâ fide* debts? If this reasoning be admissible, then a settlement of stock only may be impeached by the settlor's creditors, as it has been effectually done in the cases of *Taylor v. Jones* and *King v. Dupine*."

24. In *Taylor v. Jones* (*b*), the settlement, dated in 1734, and made after marriage, upon the wife and children, was of 1733*l.* stock, which were vested in trustees; and in 1741 the settlor gave warrants of attorney to confess judgments against him, and his creditors granted him a letter of licence, subject to an agreement that it should not prevent them from proceeding against his effects, but that it should protect his person. The Master of the Rolls decreed that the settlement was void against simple contract creditors, and he ordered the trust stock to be sold, and applied in discharge of those debts.

(*a*) 1 Rep. H. & W. 315.

(*b*) 2 Atk. 600.

25. In *King v. Dupine* (which shortly followed the last case, and is a decision by Lord Hardwicke, and reported in a note by Mr. Sanders, in his edition of Atkyns (*a*)), A was intitled, after the death of B, and C, the wife of D, to the reversion of four Exchequer annuities, which were vested in trustees, under a decree of Chancery upon the above trusts; so that A was but a cestuique trust in reversion. The plaintiff obtained a judgment against A, and filed a bill against A, the trustees, and others, and afterwards a supplemental bill, stating that a *fiery facias* had been issued upon her judgment, and that the sheriff had seized the reversion of the four Exchequer annuities, and had assigned them to W, in trust for the plaintiff: and after further stating circumstances which prevented the plaintiff from registering the assignment, the supplemental bill prayed for a sale of the reversion of the annuities, and payment of the judgment debt out of the proceeds. The trustees submitted whether the sheriff could seize the reversion of those annuities, and assign them, and whether the same ought to be sold. The bills were taken, *pro confesso*, against A. And as between the plaintiff and the other defendants, Lord Hardwicke ordered the trustees and W to assign all their reversionary estate in the four long annuities to the plaintiff, with proper directions as to the removal of all obstacles to the registry complained of in the supplemental bill.

26. "But these cases," as Mr. Jacob observes (*b*), "have been much questioned. (*c*) It is to be observed that the observations of Lord Thurlow in *Dundas v. Dutens* apply to a case where the attempt was made to impeach the settlement while the settlor was living, and are founded on the circumstance, that during his life the creditors could not, by execution

(*a*) 2 Atk. 603, and Reg. Lib. A. 1744. fo. 91: see also *Horn v. Horn*, Amb. 79.

(*b*) 1 Rep. H. & W. 316*n*.

(*c*) See Lord Thurlow's observations in *Dundas v. Dutens*, 1 Ves.

J. 198: 2 Cox. 235: also Lord Eldon's remarks in *Rider v. Kidder*, 10 Ves. 369: and in *Guy v. Pearkes*, 18 Ves. 197: and *Grogan v. Cooke*, 2 Ball & B. 230.

at law, render the stock available to their demands. But after his death the case admits of different considerations : the stock, if not settled, would then become assets, and if the settlement had for its object to deprive the creditors of the remedies which they would otherwise have on the settlor's death, it seems to come within the meaning of the statute. In these cases it does not seem to have been doubted that the words 'goods and chattels' in the statute, comprised stock. (a) "

27. And where the settlor has brought himself within the operation of the insolvent debtors act, it seems that such a settlement might be impeached.

28. Thus, in *Norcutt v. Dodd* (b), a voluntary settlement of an annuity was held void against the assignees in insolvency of the settlor, Lord Cottenham, C., saying, that the difficulty which arose upon the stat. of Elizabeth with respect to voluntary assignments of choses in action was, that during the life of the debtor, creditors could not be said to be prejudiced by them, inasmuch as that species of property was not liable to be taken in execution ; but after his death it was otherwise, because then the creditors might reach all his personal property, of whatever kind ; and the same reason applied where the debtor had brought himself within the operation of the insolvent debtors acts, because under those acts all his property became applicable to the payment of his debts.

29. It does not seem necessary that debts owing by the husband at the time he makes a voluntary settlement should be absolutely due, in order to enable such creditors to defeat the deed ; but that debts then in contingency would have that effect. Thus, in *Rider v. Kidder* (c), the husband,

(a) See *Brown v. Bellaris*, 5 Mad. 53 : *Rex v. Capper*, 5 Price, 217.

(b) 1 Cr. & Ph. 100.

(c) 10 Ves. 360—370. Mr. Roper notices, (1 Rep. H. & W. 317), that there must be a mistake in the ar-

rangement of his lordship's words ; and that in order to convey correctly his lordship's meaning the words ought to be thus transposed : " my opinion is, the plaintiff would be a creditor under a marriage set-

by settlement prior to his marriage, covenanted for payment to his wife, if she survived him, of 3000*l.* within twelve months after his death, &c. He, during the marriage, made a voluntary settlement upon another woman, and died; and Lord Eldon is reported to have said, his opinion was, "that the widow would be a creditor under a marriage settlement that a fraudulent conveyance would affect."

30. In cases where the settlement may be avoided by creditors, yet if their debts be afterwards paid, the deed will be good against the settlor, and all persons claiming as volunteers by or under him. (a) In *Curtis v. Price* (b) Sir William Grant said, "a settlement of this kind is void only as against creditors, but to the extent alone in which it may be necessary to deal with the estate for their satisfaction. To every other purpose it is good. Satisfy the creditors and the settlement stands."

31. Upon the principle of the mere circumstance of the settlor being indebted when he made the settlement after marriage not rendering such deed void, but as *prima facie* raising presumptive evidence of fraud, if the settlor be not then indebted, but becomes so immediately upon or shortly after the making of it, the intention of making it will be presumed to have been to defraud the subsequent creditors, which will therefore defeat the settlement. (c)

32. When the voluntary settlement upon the wife is of real estate, if the husband reserve to himself a general power of revoking the uses and trusts limited and declared in it, that reservation will invalidate the settlement against purchasers for a valuable consideration, and statute and judgment creditors (d), as it will do in the instances of antenuptial settlements, which have been noticed in a preceding

tlement that would affect a fraudulent conveyance," *i. e.* a voluntary conveyance.

(a) *Hawes v. Leader*, Cro. Jac. 270.

(b) 12 Ves. 89. 103; S. P. *ex parte* Bell, 1 Glyn & J. 282.

(c) 1 Atk. 93; 2 Atk. 481.

(d) 2 Vern. 510.

section. And it is presumed that voluntary settlements by a husband of his personal estate would be equally void against creditors upon presumptive fraud, if they contained the like powers; since, notwithstanding the deeds, the husband would continue to have the absolute dominion over the settled property, and the reservations of such powers would raise a strong inference, that the motives or objects of the settlements were to exempt the husband's personal estate from his subsequent obligations. It is conceived, however, that the effect of such powers upon the validity of voluntary settlements would be subject to the like distinctions as were mentioned in the above section.

33. And where no power of revocation is expressly reserved in a voluntary settlement; if, nevertheless, the husband retain or reserve to himself so large an interest or power over the settled personal fund as to show the intent of the transaction to have been to defeat his creditors, under the colour of a *bonâ fide* settlement; such reservation of power will be fatal to the instrument.

34. Thus, in *Russel v. Hammond* (a), it appears from the last settlement mentioned in that case, that the husband reserved to himself and wife for life an annuity of 27*l.*, which was supposed to be the probable value of the settled estate. This Lord Hardwicke considered to be a plain badge of fraud, and almost tantamount to a continuance in possession. He was therefore of opinion, that the creditors were intitled to be relieved against such settlement.

35. Another circumstance which has been considered to invalidate a voluntary settlement as against creditors upon presumptive fraud is, when, notwithstanding the settlement purports to be an absolute transfer of personal property, the husband continues in possession of it; and, contrary to the transaction, is permitted to appear as the owner, and to obtain false credit. (b)

(a) 1 Atk. 16.

Stone v. Grabbam, 2 Bulstr. 218:

(b) *Twine's case*, 3 Rep. 8 b.: *Edwards v. Harben*, 2 Term Rep. 587.

36. The rule was laid down by all the judges in *Bamford v. Barrow* (a), to the following effect; that unless possession accompanies and follows the deed, it is fraudulent and void. It is a consequence from this rule or definition, that if the possession of the husband be consistent with the settlement, there can be no fraud presumed from the circumstance of the settlor continuing his possession, on account of which the deed can be avoided. (b)

37. Accordingly, if the settlement of the husband's personal estate were conditional, *i. e.* to take effect upon his being paid a sum of money; and that payment or condition was not merely colourable (c), his continuance in the mean time in possession of the settled property would not avoid the settlement; because, by the terms of the deed he is not to part with the possession until the condition be performed, and according to the above rule the possession follows the deed. (d)

38. But it is presumed that if the voluntary settlement appear to be so contrived that the possession of the property by the settlor shall be in conformity with the deed, manifesting at the same time the object to be to defraud subsequent creditors, and still to secure the possession of the property to the settlor, such settlement will be void against creditors. (e)

39. This, it is conceived, appears from the case of *Stileman v. Ashdown*. (f) There two purchases were made in the joint names of a father and his two sons. The father paid the consideration money, and afterwards died, having till that time continued in the possession of the lands, and from

(a) 2 Term Rep. 594, *in notis*.

(c) *Griffin v. Stanhope*, Cro. Jac.

(b) *Kidd v. Rawlinson*, 2 Bos. & Pull. 59: *Arundell v. Phipps*, 10 Ves. 139—145, *et infra*: *Bucknal v. Royston*, Pre. Ch. 285: *Cadogan v. Kennet*, Cowp. 432: and *Hase-linton v. Gill*, 3 Term Rep. 620, *in notis*.

454.

(d) 2 Bulstr. 218.

(e) *Lavender v. Blackstone*, 2 Lev. 146.

(f) 2 Atk. 478: see also *Christ's Hospital v. Budgin*, 2 Vern. 683.

thence the possession was continued by the two sons. The question was between the executor of the father's judgment creditor and the two sons, who resisted the claim, upon the grounds of the purchases having been made for their advancement. But Lord Hardwicke decreed in favour of the judgment creditor, observing that this was a singular case; that in other instances purchases as advancements had been generally made in the names of the children only, and then the possession of the father was considered as that of their guardians during infancy; but that here the purchases having been made in the name of the father as well as in the names of his two sons, they were joint tenants, and that such purchases did not answer the purposes of advancements, for it intitled the father to the possession of the whole until a division or severance, and by survivorship he might have become intitled to the whole; and that the father had been in possession of the whole estate, and appeared the visible owner, and the creditor would have been intitled to an *elegit* for a moiety. His Lordship, after noticing that a voluntary settlement by a person not indebted at the time, but made with a view to debts *in futuro*, would be fraudulent and void, said, he therefore decreed the creditor, in this case, to be let in upon the estates jointly purchased by the father and sons. His Lordship, therefore, must have considered the purchases, and the father's possession in conformity with the deeds, to be contrivances to defeat creditors.

40. Settlements made after marriage, in pursuance of articles entered into before it, have been already noticed. (a) The only subject remaining to be considered, is in what cases settlements made after marriage upon the wife and children, not in consequence of articles, can be supported against purchasers and creditors on the ground of valuable consideration.

(a) *Suprà*, p. 111.

41. It is the practice of almost every day for the Court of Chancery to direct settlements to be made upon the wife, and they are good, not only in equity, but at law; for in such cases the presumption of fraud fails, and the Court will support its own acts. (*a*)

42. If the settlement be made between the husband and the wife's friends on her behalf without the intervention of the Court of Chancery, in consideration of her father, or some other person, advancing a sum of money, such settlement, although made after the marriage, will be valid against creditors and subsequent purchasers, as a settlement made for a valuable consideration, and not within the two statutes of Elizabeth. (*b*)

43. And it seems that if the money be not actually paid, but it be well and fairly secured to be paid, the effect will be the same. Thus, in a case (*c*) where A, as daughter of B, was intitled to a moiety of 12,000*l.* secured by her mother's marriage settlement, subject to the contingency of being lessened by the birth of another daughter, A clandestinely married C, and afterwards B secured A's 6000*l.* upon his estate, and B made a settlement upon her. The Court determined that the settlement was good against B's creditors.

44. In *Middlecome v. Marlow* (*d*), the wife was intitled to a leasehold estate, and a share of her father's residuary personal estate amounting to 500*l.* The wife married during infancy, and her husband afterwards by deed agreed with her father's executors that the 500*l.* should be settled to her separate use for life, and then to the issue of the marriage; and the trustees were empowered to advance to the husband as a loan all or any part of the money. The trustees lent to him all the money, and he became a bankrupt. And at

(*a*) *Ambl.* 121 : *Cowp.* 432—436.

(*b*) *Colville v. Parker*, *Cro. Jac.* 158 : 2 *Ves. Sen.* 309 : 1 *Atk.* 190 :
see also *Doe v. Webber*, 3 *Nev. & Man.* 586.

(*c*) *Wheeler v. Caryl*, *Ambl.* 121 :
Moor v. Rycault, *Pre. Ch.* 22, *S. P.*

(*d*) 2 *Atk.* 519.

the suit of the trustees, Lord Hardwicke allowed them to prove the 500*l.* as a debt, although it was resisted by the assignee under the commission upon the ground that the money was not advanced to the husband as a loan, but in payment of the legacy, and receipts were produced under the husband's hand for money due on account of the legacy, one of which was before the deed. And his Lordship observed that although the Court would not have directed that settlement if the husband had any estate of his own to settle, yet it was proper as there was no consideration on the husband's side, and as the Court would have done just the same thing upon the Master reporting this to be the circumstance of the case; there was, therefore, no pretence to call the settlement unreasonable. His Lordship added, that the Court never weighed nicely what would be the particular advantage on one side or the other under a settlement, if it be just in general (*a*); and he said, although, after the execution of the deed, the receipts were given as for a legacy, yet they must be taken to be upon the footing of the deed of trust.

45. It has been before noticed (*b*), that the Court of Chancery will order an additional settlement to be made upon the wife on an increase of fortune falling to her, which settlement will bind both creditors and purchasers of the husband. The effect will be the same if such settlement be made between the husband and the friends of the wife, and be not a colourable, but a *bonâ fide* transaction.

46. Thus, (*c*) A, the wife of B, having a contingent interest under a bond given by B on the marriage, but no judgment entered up nor any trustees added for her, had also a lease of the corn-meter's office left her by the will of her father, whose executor would not consent to the husband's sale of it, unless he made a further provision for her. But

(*a*) 8 Term Rep. 529.

(*b*) *Ante*, p. 98 : and see 5 Ves. Jun. 737 : 10 Ves. 574.

(*c*) Ward *v.* Shallet, 2 Ves. Sen.

16 : see also Jones *v.* Marsh, Forrest. 64 : Brown *v.* Jones, 1 Atk. 188.

on a meeting with her friends she agreed, that upon settlement of part of the money arising from the sale, for her separate use during B's life, and afterwards for the children of the marriage, she would part with her interest under the bond, and that the other part of the money should go to the husband, who afterwards became a bankrupt. The assignees attempted to set aside this arrangement. But Lord Hardwicke supported the transaction, because there was a clear consideration arising from the wife and her friends, which was the parting with her contingent interest under the bond, which he considered she might do, the transaction having been between her and her husband with the privity and consent of her friends. His Lordship then said, that this consideration took it out of the statute of Elizabeth, in respect of creditors, and that, as to the statutes of bankruptcy, they did not extend to cases where there was a consideration. If, therefore, the father or collateral relation advanced a sum of money by way of new portion, in consideration of which the husband made a new settlement, it would be good against the creditors under the commission, unless proved that the settlement vastly exceeded the consideration, so that from the inadequacy a collusion or fraud was intended on the creditors.

47. As the advancement of money on behalf of the wife for a settlement will make it good against creditors, so the giving up of any valuable interest by her in consideration of the settlement after marriage will support it against creditors and subsequent purchasers, because such a settlement does not class among those that are voluntary, but amongst such as are made for a valuable consideration; in fact, the wife herself becomes a purchaser for herself and family.

48. Thus, in the above case of *Ward v. Shallet*, and in *Cottle v. Fripp (a)*, the wife being intitled to a jointure of

(a) 2 Vern. 220.

40*l.* a year, relinquished it by fine after the marriage in consideration of a bond, and a judgment confessed by the husband to her trustee to settle lands upon her of that yearly amount; the Court decreed that the bond and judgment were intitled to precedency of the husband's other creditors.

49. So also in *Lavender v. Blackstone* (*a*), the Court said that if the wife had joined with the husband in the fine (by which she would have been barred of dower), it might have made the settlement after marriage to be of good consideration, which otherwise was merely voluntary.

50. It seems that the provision made by the husband for his wife may in its creation be voluntary and void as against creditors, and yet become afterwards binding upon them. Thus, if he were to give a bond to a trustee to pay a sum of money within six months to be settled upon his, the obligor's wife and family, this is a good bond against himself, but it may be defeated by his creditors: but if the six months elapse, and the husband, instead of paying the money, gives another bond to the trustee in consideration of being allowed a further period for payment of the money, and of the surrender of the first obligation; it is presumed that, in analogy to the case of *ex parte Berry* (*b*), the second bond will not only be binding upon the husband, but also upon his creditors; upon the principle, that the first bond, although voluntary, (it being good between the parties, and upon which the obligor might have been compelled by legal process to have paid the money), having been surrendered for another security, the forbearance and surrender constitute such a valuable consideration as to make the transaction binding upon the husband's creditors. The transaction, however, must not be fraudulent, for if the original design of the parties in thus giving, accepting, and surrendering the securities, was an attempt to create a valuable consideration by trick and contrivance, it would taint the whole transaction and prove ineffectual.

(*a*) 2 Lev. 147.

(*b*) 19 Ves. 218.

51. If the wife enjoy property to her own separate use, and subject to her own separate and absolute disposition, and she give any part of it to her husband, or charge it for his use in consideration of a settlement after marriage, she will be a purchaser of the provision, and the settlement will be binding upon his creditors and subsequent purchasers.

52. Thus, in *Lady Arundel v. Phipps (a)*, the wife had a general power of appointment under her marriage settlement in default of issue male (of which there were none), of certain estates belonging to her own family, and comprised in the settlement, with the ultimate limitation to her own heirs. She, dealing with such her separate estate, contracted with her husband for the purchase from him of several paintings, drawings, engravings, plate, jewels, &c., by providing out of her estates, after the survivor's death, for payment of several of his debts, amounting to 12,000*l.*, and releasing him from a considerable debt affecting such estates, and which had been borrowed for him, and by resettling the estates as therein mentioned, and which matters were effected by her exercising the above power of appointment. The husband, on his part, assigned to trustees for his wife the paintings, drawings, &c. The question was, whether this postnuptial settlement was valid against the husband's creditors. The husband, it seems, continued in possession, which however appeared to be unavoidable, and was not inconsistent with the deed, since his possession must be considered as that of the wife, the trust being to permit her to use and enjoy, &c. And Lord Eldon expressed his opinion that, if the wife's purchase were *bonâ fide*, it was of no consequence whether it was before or after marriage; that the mere circumstance of the possession of chattels, however familiar it might be to say that it proved fraud, amounted to no more than that it was *primâ facie* evidence of property in the man possessing them, until a title not fraudulent were shown under which that possession had followed.

53. The case was never decided in equity, though much discussed both there and at law. (a) At law the settlement, under all the circumstances, was found by a jury to be fraudulent, but not to the satisfaction of Lord Eldon, who intimated, that if the property sold to the wife bore any reasonable proportion to the value of the 12,000*l.*, the settlement would be good if divested of circumstances of fraud. He therefore directed an issue to the Court of Common Pleas, the trial of which, it is believed, was prevented by the compromise of the suit.

54. What is a reasonable proportion or value between the thing given or paid, and that settled in consideration of it by the husband, is a point which in each case depends upon its peculiar circumstances. The question is incapable of a general definite answer, and when the Court is unable to draw the conclusion after weighing all the circumstances, the fact must be ascertained by a jury. This alone can be affirmed, that if the settlement be just in general, the Court does not weigh with exactness the particular advantage gained on the one side or the other; but that if the disproportion be so great as would strike any man of common sense with the inadequacy between the settlement and the price given for it, then such circumstance will raise so violent a presumption of fraud as to vitiate the transaction and let in the husband's creditors.

(a) 6 East, 257.

CHAPTER III.

OF THE RIGHTS OF THE WIFE ON HER HUSBAND'S BANKRUPTCY,
WHERE HE HAS BOUND HIMSELF TO SETTLE A SUM OF MONEY
UPON HER.

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| <hr/> 1. <i>Sum payable to wife or her trustees before bankruptcy may be proved.</i>
3. <i>Sum payable on contingency formerly not proveable.</i>
4. <i>Unless where security given constituted immediate demand.</i> | <hr/> 5. <i>But debt payable on contingency may now be proved.</i>
8. <i>Unless where value of contingency not ascertainable.</i>
10. <i>Right of trustees where husband has life interest in sum covenanted to be paid.</i> <hr/> |
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1. If the husband has previously to the marriage bound himself by bond or covenant for payment of a sum of money to his wife, or to trustees for her benefit, and the sum becomes payable before his bankruptcy, it constitutes a present debt, and may be proved under the commission. Thus, if the sum is to be paid or settled upon the marriage, or as speedily as may be after the marriage (*a*), which in substance is the same, or if it be payable on demand, and a demand be made previous to the bankruptcy (*b*), it may be proved as a present debt.

2. And where the marriage settlement falsely recited that the husband was possessed of 1000*l.* and upwards in trade, and he covenanted that 500*l.*, part of it, should be vested in trustees for his wife and children, and afterwards became bankrupt, it was held that the 500*l.* was a debt proveable under the commission, on the ground that the husband was bound to make good the representation contained in the settlement. (*c*)

(*a*) *Ex parte* Granger, 10 Ves. 244: *ex parte* Brenchley, 2 Glyn & J. 174.

(*b*) *Ex parte* Campbell, 16 Ves. (c) *Ex parte* Gardner, 11 Ves. 40.

3. But the rule was different (previously to the 6 Geo. 4., c. 16) in cases where the sum had not come payable before the bankruptcy: a future debt could not be proved under a commission, if it was subject to a contingency, or if the time of payment was uncertain. (a) If the sum was payable at a future ascertained period, free from any contingency, it might be proved. (b) But if it was payable on a contingency, as in the event of the wife surviving (c), or on demand, and no demand was made prior to the bankruptcy, or at an uncertain period (d), as on the death of the survivor of the husband and wife (e), it could not be proved.

4. However, although the debt was contingent, if the bankrupt had given a security, constituting an immediate demand against him at law, the proof was received upon the footing of there being a legal debt, the payment of the dividends being arranged upon equitable terms. Thus, if the sum was secured by a judgment against the bankrupt (f), or by a bond with a penalty, which had become forfeited by a breach of any part of the condition (g), the Court availed itself of the legal right which these securities gave, to admit a proof which in equity ought to be allowed. (h)

5. But by the 6 Geo. 4. c. 16, s. 56, in all cases of debts payable upon a contingency which has not happened before the issuing of the commission, the creditor may, if he thinks fit, apply to the commissioners to set a value upon such debt, and they are required to ascertain the value, and admit the creditor to prove the amount so ascertained, and to receive dividends thereon: or if the value shall not be so ascertained before the contingency shall have happened, the creditor may

(a) *Ex parte Barker*, 9 Ves. 110.

(b) *Ex parte Cottrell*, Cowp. 742: *Pattison v. Binkes*, *ibid.* 540: see *ex parte Mitford*, 1 Bro. C. C. 398: and 9 Ves. 114: 3 Mer. 105.

(c) *Ex parte Groome*, 1 Atk. 115.

(d) *Ex parte Alcock*, 1 Rose, 323; 1 Ves. & B. 176.

(e) *Ex parte Barker, ubi sup.*

(f) *Ex parte Smith*, Cooke's Bank. Law, 212: see 1 Atk. 117.

(g) *Ex parte Rowlatt*, 2 Rose, 416: *Ex parte Elder*, 2 Madd. 282.

(h) See 1 Glyn & J. 115.

prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends. (a)

6. In *ex parte* Hooper (b), where the husband, having received 550*l.* with his wife, on his marriage gave a bond to trustees conditioned for payment of 1100*l.* on receiving notice from the trustees, it was held that, although no notice had been given, the debt was proveable within the above section.

7. In *ex parte* Tindal (c), the husband covenanted to secure to his wife 80*l.* for her separate use, and within twelve months after her decease to cause 4000*l.* to be paid to her trustees, with interest from the time of his death, in trust to pay the interest to her for life, in case she survived him, and after her death in trust to pay and assign the money and interest between their children; and if they should have no child, to the survivor of them, his or her executors, administrators, and assigns. The husband having become bankrupt, and his wife being still living, the trustee applied to prove for the value of the 4000*l.* The proof was rejected for the commissioners; Sir L. Shadwell, V. C., on petition, directed that the proof should be allowed. This decision was afterwards reversed by Lord Lyndhurst, C. (d) The case was afterwards reheard before Lord Brougham, C., with the assistance of Tindal, C. J., and Littledale, J.; who held that the debt was proveable. (e)

8. But the debt will not be allowed to be proved where the value of the contingency cannot be ascertained. Thus, where the husband by his marriage settlement covenanted that his heirs, &c. should, within twelve months after his death, pay 4000*l.* to trustees, in trust for the wife during her life, and afterwards for the children of the marriage, and

(a) The act is retrospective, *ex parte* Grundy, Mont. & M'Ar. 293.

(b) 1 Mont. & Ayr. 395; 3 Deac. & Ch. 655.

(c) Mont. & M'Ar. 415.

(d) Ibid. 422.

(e) Mont. 375. 462; 8 Bing. 402; 1 Moo. & Sc. 607; 1 Deac. & Ch. 291.

if there were no children who became intitled, in trust for the survivor of the husband and wife. There were no children. The husband having become bankrupt, it was held by Lord Lyndhurst, C., on appeal, that the contingency was incapable of being valued. (a) And this has also been held to be the case where the contingency depended on the separation of husband and wife, and of a widow's not marrying. (b)

9. Where the husband before marriage gave a bond for 3000*l.* to trustees to secure the payment by his executors of an annuity of 150*l.* in case his intended wife should survive him, for her benefit, the husband and his wife being both living, it was held on the husband's bankruptcy that the trustees could prove for the annuity under the fifty-fourth section of the above statute. (c)

10. When the husband becomes bankrupt, having covenanted to settle a sum so as to give himself a life interest, the trustees have a right to withhold the dividends from his assignees until the sum covenanted to be settled is made up.

11. Thus, in *ex parte* Turpin (d), a trader upon his marriage having given a bond for 3000*l.*, to be settled on himself for life, remainder to his wife and children, it was held on his bankruptcy, that the trustees were intitled to prove for the whole sum secured, and to retain the dividends during his life, until the whole sum was made up.

12. So, in a case where, by the terms of the settlement, the wife's property was settled upon her in case of the husband's death, or the parties being divorced, but the husband was intitled to the interest for his life, and in case he survived his wife, he was to have a certain share

(a) *In re* Gibbins, 8 Law J. Chan. 96: but see *ex parte* Tindal, *ubi sup.*

(b) *Ex parte* Davis, Mont. 121; 1 Deac. 115; S. C. on appeal, Mont. 297.

(c) *Ex parte* Broadley, 2 Mont. D. & D. 524; 6 Jur. 600.

(d) Mont. 443; 1 Deac. & Ch. 120: see *ex parte* Young, 2 Mont. & Ayr. 228: *ex parte* King, 2 Mont. & Ayr. 410: *ex parte* Smith, 2 Mont. & Ayr. 537.

in the property, it was held that the wife might, in the name of her trustees, make such proof as the commissioners might think she was intitled to, and that the dividends and interest on such proof should accumulate for her benefit. (a)

13. Where the husband had covenanted to pay 6000*l.* to the trustees of the settlement, a similar sum having been assigned to the trustees by the wife, and the trusts of the two sums were for the separate use of the wife during the joint lives of herself and her husband, and, on the death of either, to the survivor for life, and then to the children, it was held, on the bankruptcy of the husband, that the trustees might sell his contingent interest in the whole fund, and apply the produce in part satisfaction of his covenant. (b)

(a) *Ex parte* Saunders, 3 Deac. & Ch. 568.

(b) *Ex parte* Gonne, 3 Mont. & Ayr. 166; 2 Deac. 279.

CHAPTER IV.

WHAT SETTLEMENTS BY THE HUSBAND WILL BE CONSIDERED
TO BE IN FRAUD OF THE BANKRUPT LAWS.

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| <hr/> 2. <i>Bond to be sued upon only in event of husband's bankruptcy fraudulent.</i>
3. <i>Although connected with articles if wife's property not settled.</i>
5. <i>Husband cannot settle his own property so as to intitle wife on his bankruptcy.</i>
6. <i>But trust for maintenance of wife on husband's bankruptcy valid.</i>
7. <i>And wife's property may be set-</i> | <hr/> <i>led so as to determine husband's interest on his bankruptcy.</i>
12. <i>Husband's bond for wife's fortune payable on bankruptcy, proveable.</i>
14. <i>Power of equity to correct settlement.</i>
15. <i>Lien on wife's estate conveyed to husband, for money covenanted to be paid by him in consideration of conveyance.</i> |
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1. No person is allowed by any device to counteract the spirit and intention of the bankrupt laws. Lord Redesdale, in *ex parte* Murphy (*a*), said, that although he was bound to decide in favour of a debt whether it were legal or equitable, yet that, if it appeared to be a contrivance to evade the bankrupt laws, the debt was not conscientious, and no dividend ought to be paid upon it. As to what will be considered such a contrivance, it is presumed that upon consideration of all the cases the following distinctions may be established.

2. If a bond be given by the husband before marriage to pay a sum of money for his wife's use, with a condition or defeasance not to put it in force except upon his failure or insolvency, or bankruptcy, such a bond will be fraudulent and void against the husband's creditors, and will not be

(a) 1 Sch. & Lef. 44.

permitted to be proved under his commission. (a) Upon this point, Lord Eldon, in *ex parte* Cook (b), expressed himself to the following effect:—"If the husband be to give a bond with condition to pay money, in the event of his bankruptcy, there is great difficulty upon the point whether the demand is not fraudulent against creditors. There have been cases, both before Lords Thurlow and Rosslyn, in which each of them held, that if it were not the case of a settlement of part of the wife's property, but a bond by the husband, it would not do."—In *ex parte* Hodgson (c), his Lordship was more explicit, declaring, that if the case before him were to be considered merely as the husband's bond, it would not do.

3. And although the bond be connected with articles or a settlement, yet if the wife's property be not the subject of the settlement, and it appear from the instruments that the intention of the parties was to create a debt merely upon insolvency or bankruptcy of the husband so as to create a demand out of his estate, such contrivance and securities will be void against his creditors.

4. Thus, in *ex parte* Murphy (d), the wife of the bankrupt and her trustees under a marriage settlement, petitioned for leave to prove under the commission 800*l.* under the following circumstances: prior to the marriage a bond was given by the bankrupt to the trustees, conditioned for the payment of the above sum on the 3d of March, 1796, with a warrant of attorney to confess judgment, with a stay of execution till that day. At the date of the bond on the 3d of October, 1795, a settlement was executed by the bankrupt and his wife, and their trustees, referring to the bond, and covenanting that the 800*l.* should be payable and be sued for only in the event of the wife's surviving her husband. And after reciting that the husband

(a) *Ex parte* Hill, and *ex parte* Bennet, 1 Cooke's B. L. 228.

(b) 8 Ves. 355.

(c) 19 Ves. 206.

(d) 1 Sch. & Lefroy, 44: see also *Higginson v. Kelly*, 1 Rose, 368.

was a trader, it was further covenanted, that in case of failing in his circumstances, but not otherwise, the trustees were empowered to enter judgment on the bond, and to issue execution. The bankruptcy was subsequent to the 3d of March, 1796, so that the bond became absolute. Lord Redesdale said, he considered the whole device a fraud upon the bankrupt laws; and that under the first-mentioned covenant the debt was merely contingent, and the subsequent provision in case of insolvency, &c., was fraudulent, an attempt and contrivance to make that a debt in case the husband became bankrupt, which could not be so otherwise; that it was a contingent demand for 800*l.* payable only if the wife survived her husband, which was the only demand that could be made consistently with the agreement between the parties provided the husband did not become a bankrupt; that such being the nature of the demand, the settlement itself showed that it was intended to contrive what his Lordship conceived to be a fraud upon the bankrupt laws; for a clause in it noticed the husband being a trader, and that it was necessary to secure something in the event of his bankruptcy: for that purpose a bond was to be given payable at a day certain, but the sum was not to be recovered from him unless he became insolvent. As to this sum, therefore, though a legal demand, yet on the foundation of the settlement if an attempt were made to sue him upon the bond, or to enter up judgment whilst he continued solvent, he would have a right to come into a Court of Equity and prevent it, and to have the contract which was the ground of the bond carried into execution by restraining proceedings on the bond. And his Lordship added that the debt was to be taken as it stood upon the whole of the instruments executed, and the contract in the deed of settlement was that the bond should have no effect but in the case of bankruptcy; for it was not the bond that was to operate in the event of the husband dying before the wife; it was not the bond that was the security to the wife if she survived, nor to the children if

she died before her husband, so that the whole effect of the clause was to avoid the operation of the bankrupt laws. For these reasons his Lordship was of opinion that the debt could not be proved, although he could not make an order upon the petition from the irregularity of the application, which ought to have been by the assignees to expunge the debt.

5. In *Higginbotham v. Holme* (a), the husband, by settlement prior to marriage, conveyed to trustees certain freehold estates to hold after the marriage to the use of the husband for life, unless he should embark in trade, and during his wife's life become bankrupt, and from his death, or his being declared a bankrupt, which should first happen, to the use that the wife (if she were the survivor and B should be then living) should receive an annuity of 150*l.* during the several lives of herself and of B; but if B were dead at the decease or bankruptcy of the husband, or should die before the wife, then from such death or bankruptcy of the husband, and the death of B, the wife should receive an annuity of 200*l.* for life payable quarterly, the first payment to be made on the quarter-day next after the death or bankruptcy of the husband. The annuities were declared to be in bar of dower, and the wife's claims upon her husband's real and personal estates, and were to be paid to and for the wife's separate use; they were also secured from the death or bankruptcy of the husband by two terms of years created out of his real estates, and subject thereto, the ultimate use of the lands was limited to the husband, his heirs, executors, &c. At the marriage the husband was not a trader, nor did he intend to be so, he having been educated for the church; but in 1802 he became a cotton manufacturer, and in January, 1811, he became a bankrupt, B being then living. A bill by the wife claiming the annuity of 150*l.* was dismissed by the Master of the Rolls, from which decree she appealed; and Lord Eldon said that the facts were, that the husband at the time of the

marriage was not indebted, and had no formed purpose of entering into trade, but having been intended for the church he changed his purpose, entered into trade, and became a bankrupt. The question was, whether a provision of this kind could be sustained against creditors by charging his estate as against their right under the commission with the annuity to which the wife would upon his death have an undoubted title. His Lordship then said, he had vainly endeavoured to apply the principle of those cases which turned upon the fact that a man not indebted nor a trader at the time made a settlement without reference to debts to be contracted in future, and to the future event of bankruptcy, but that the present case had no resemblance to those; that the present settlement looked forward to a change of intention, to the purpose of becoming a trader, and also expressly to the possible consequences of that purpose, and thus looking forward to such a change of purpose and to such consequences, it was a limitation by the effect of which the estate would go to the creditors, that change being adopted with the express object of taking the case out of the reach of the bankrupt laws. And as to the consideration from the covenant of the father, which, although it might perhaps prove worth little or nothing, was to be regarded as a consideration with reference to all the provisions of the settlement; and that although an annuity might have been provided by the settlement for the wife in all events, yet it was not competent for a party giving a consideration for a contract which was a direct fraud upon the bankrupt laws to have the benefit of it. His Lordship then said, that he could not assimilate this transaction to the case of the wife's property limited until the bankruptcy of her husband; nor to that of a lease made determinable by the bankruptcy of the lessee, which was a reservation by the owner of the property of a power over it; nor to the case *ex parte* Winchester (a) and others, where, as the contingency happened previously to the bankruptcy, the debt was prove-

(a) 1 Atk. 116.

able; nor to the case put by Lord Kenyon (*a*), and observed upon by Lord Redesdale (*b*), of a bond payable immediately and given by a trader upon his marriage to trustees to secure a provision for his wife and children. His Lordship therefore confirmed the decree. (*c*)

6. But a trust may be created of the husband's property for the maintenance of his wife and children, which will be valid on his bankruptcy. (*d*)

7. And by articles or settlement before the marriage, the wife's property, in which the husband might have had, if not a bankrupt, either a partial interest with her, or a separate one, may be limited to her husband until he become a bankrupt or insolvent, and from either event to the wife's separate use for life, and after her death to the children of the marriage. (*e*) In such a case the subsequent creditors of the husband cannot be considered as defrauded, because the wife, whilst single, dealt only with her own property in contemplation of the marriage, and she was at liberty to settle it in such manner and upon such terms as she and her intended husband pleased. There is nothing improper in her or her friends providing against the insolvency of the husband, and stipulating for a return of her own property for the support of herself and family in the event of such insolvency, by which he is rendered incapable of performing that duty out of his own. The first authority upon this subject was *Lockyer v. Savage* (*f*), which has ever since been followed; and in *ex parte Cook*, after stated, Lord Eldon said that this doctrine ought to be considered as now settled.

8. In *ex parte Hinton* (*g*), Fitz, the husband, became bankrupt in 1805. In 1794, by settlement before his

(*a*) See *Staines v. Planck*, 8 Term Rep. 389.

(*b*) 1 Sch. & Lef. 48.

(*c*) See also *ex parte Oxley*, 1 Ball & B. 257: and *ex parte Taaffe*, 1 Glyn & J. 110.

(*d*) See *Page v. Way*, 3 Beav. 20: *Kearsley v. Woodcock*, 3 Hare, 185.

(*e*) *Ex parte Cooke*, 8 Ves. 356.

(*f*) 2 Stra. 947.

(*g*) 14 Ves. 598.

marriage with Elizabeth Randall, 540*l.* (her property) was assigned to the petitioner, her trustee, with power to lend the money to the husband, to whom 500*l.*, part of it, was advanced upon his bond, dated in June, 1794, to be repaid on the 18th of December then next. The settlement recited the bond, and declared that if the marriage took effect, the bond and money should be in trust, that the trustees (of whom the petitioner was the survivor) should, when they thought proper, recover and receive the principal sum, and pay the interest to the husband for life, if he so long continued solvent; but if he became a bankrupt, then to pay the interest to the wife, if she survived him, for life, for her separate use, and to her separate receipt, as if she were a feme sole; but if she were then dead, then to permit the 500*l.* to be enjoyed by the children of the marriage, but if no children who attained twenty-one, then the bankrupt was to be intitled to it absolutely. The wife died leaving one child, and to prove this debt was the prayer of the petition. And Lord Eldon said, that upon the authority of the case in *Strange (a)*, which had been followed by Lord Thurlow, the trustee was intitled to prove this debt, upon the distinction that this money was part of the wife's property, not the bankrupt's. That the case in *Strange* was also an authority that money (the wife's property) might be limited upon the bankruptcy of the husband. That the articles being before marriage, the wife was a purchaser for herself and the issue, who could have no remedy against the trustee.

9. So in *Lester v. Garland (b)*, where the husband received a fortune of 5000*l.* with his wife, and settled a sum of three per cent. reduced bank annuities, upon trust to pay the dividends to himself for life until he should become bankrupt or insolvent, with limitations over for the benefit of his wife and children in the event of his bankruptcy or insolvency, and it was provided that if he should survive his wife, and

(a) *Lockyer v. Savage*, 2 Stra. 947. (b) 5 Sim. 205; Mont. 471.

there should be no children of the marriage, and he should then be, or should have been a bankrupt, fifteen sixty-sixths of the trust fund should be in trust for the next of kin in blood of the wife. Sir L. Shadwell, V. C., after remarking that the parties to the settlement must have agreed that fifteen sixty-sixths should belong to the next of kin of the wife, because they had calculated that at the then price of the stocks the 5000*l.*, the amount of the wife's fortune, would have purchased the amount of fifteen sixty-sixths of the whole fund, and that though it was not so expressed in the settlement, he thought himself warranted by the general tenor and substance of it to declare that the settlement was to be considered precisely in the same manner as if the amount of the wife's fortune was 5000*l.*, and as if the 5000*l.* had been invested in the purchase of three per cent. reduced annuities, held that the fifteen sixty-sixths were to be considered as that portion of the trust fund which was purchased with the wife's property, and that as to so much of that fund, the limitation over in the event of the bankruptcy or insolvency of the husband was good.

11. So, also, in *ex parte* Cooke (a), the wife, amongst other property, being possessed of 10,000*l.*, it was agreed by articles of settlement before marriage, that the sum should be vested in trustees to pay to her separate use 200*l.* a year, and the surplus dividends to the husband, until he should become bankrupt or insolvent, and then in trust for her separate use, and after her death for the children of the marriage; but if there were none, then the principal was to belong to the survivor of the husband and wife. And it was further agreed, that the residue of the wife's personal estate should be paid to her husband, if living when she attained twenty-one, in right of marriage, he first executing a bond, which he covenanted to do, in the penalty of 10,000*l.*, conditioned to pay 5000*l.* at the end of six months from the date of the

(a) 8 Ves. 354.

bond. And it was declared that the bond should be to the intent only, that in case the husband should become bankrupt or insolvent, or if he should at his death be insolvent, then the trustees should forthwith put the bond in force, and be possessed of the money upon the same trusts as were declared of the 10,000*l.*, except that the husband should not be intitled to the interest for life if he survived his wife, but that the principal should go upon her death as it would have done on both their deaths; and that no suit should be instituted on the bond, unless the husband became bankrupt or insolvent; also, that if he died without having become a bankrupt, &c., the bond should be delivered up, and the 5000*l.* considered part of his personal estate. The marriage took effect, and the wife attained twenty-one, and performed her part of the articles. The trustees proved under the commission the 10,000*l.*, which, with 5000*l.*, the produce from the sale of part of her real estate, and the whole residue of her personal estate, had been received by her husband. And the question was, whether the bond debt of 5000*l.* could also be proved? And Lord Eldon determined that the wife was intitled to prove it, if not for that sum, yet for so much of the residue of the value of the real and personal estate beyond 10,000*l.*, as might constitute any part of that 5000*l.* His Lordship said, that whatever inaccuracy there might be in that, the present was a settlement resting in covenant and articles. The marriage was upon an agreement to be carried into execution by future acts; so that if there were any mode of sufficiently providing against bankruptcy, the Court ought substantially to provide against it in the execution of such an article.

12. It appears from the authorities before stated, that although the wife may reserve a power over her own property, and limit it by articles or settlement, so as to retake it to her separate use, or when lent to her husband, a dividend upon it in the event of his bankruptcy; yet that she cannot effect this object at law by accepting a bond, with a condition to

create a debt on that contingency; the effect of such a security (excluding the consideration of the policy of the bankrupt laws) being, as it is presumed, to raise no debt prior to the bankruptcy; none such, therefore, as a legal debt, is capable of proof under the commission. But since equitable as well as legal demands may be proved, and a bond, although void at law, may be good in equity as evidence of a contract, if the husband's bond contain sufficient to show an agreement concerning the wife's property (as in the next case), and that it should be settled, in the event of her husband's insolvency, upon herself and family, a Court of Equity will support it (so far as the wife's fortune was the consideration) in the same manner as we have seen it will do when the transaction is by settlement, or by bond and settlement; the Court making no difference between the circumstance of the specific property being settled or lent to the husband. (a)

13. Thus, in *ex parte* Hodgson (b), William Lowe, in contemplation of his marriage on the 6th of April, 1805, gave his bond to a trustee in the penalty of 700*l.*, reciting his intended marriage with Mary Orme; in consequence whereof, and of the property which she was intitled to under the will of her father, it was agreed, that after the marriage, in case of the insolvency of Lowe at any time during their several lives, it should be lawful to William Bailey, the trustee on behalf of Mary Orme, to come in under any assignment or commission of bankruptcy, as a creditor, and to make proof, as well of the sum of 500*l.*, as of so much beyond that sum as could be ascertained, that Lowe should have received as the distributive share of Mary Orme in the personal estate of her father, and receive dividends, &c.; and that the dividends when received should be paid and applied to the only proper use and behalf of Mary Orme, and not in any manner to be

(a) 8 Ves. 357: 1 Buck, 187. *parte* Young, 1 Buck, 179; 3 Mad.

(b) 19 Ves. 206: see also *ex* 124.

subject or liable to the debts, power, or control of her husband; and that Lowe, if his wife survived him, should leave by will, or give by settlement, an annuity of 50*l.* to her for life; and in case of children, should give so much of her fortune as he should have received among them equally, and declaring the condition of the bond accordingly. Mrs. Lowe was intitled to a legacy of 500*l.* under her father's will, and to 80*l.* under the will of her brother, who bequeathed the residue of his personal estate equally among his sisters. Both sums were received by William Lowe. On the 28th of August, 1811, a commission of bankruptcy issued against Lowe. The trustees attempting to prove the 500*l.* and 80*l.*, a claim was admitted; and the petition, presented by the assignees, prayed that it might be expunged; and Lord Eldon decided that the 80*l.* could not be proved. And with regard to the other sum, he said, he never saw such a security, it not providing that it should be forfeited if the party became insolvent; on the contrary, that it was a bond in a certain sum, with a condition, that if the husband became insolvent, the party should prove and receive dividends under any commission of bankruptcy; that he looked upon it as a marriage agreement, that the property of the wife, payable on her marriage, and to which she might become intitled from her father, was what the husband was to have the use of until his bankruptcy or insolvency. His Lordship said, that if the stipulation were that the husband should possess his wife's estate, subject to return it in case he became a bankrupt, that would do; for it was clear in that Court that her estate might be limited to him until he became bankrupt. The Court's declaration was, that proof of the 500*l.* might be admitted; although in form a bond, it was an agreement as to her estate, that it should be enjoyed by the husband till he became a bankrupt, and was to be considered, therefore, as a limitation of her estate until his bankruptcy. The claim of the 80*l.* was struck out.

14. In *ex parte* Cooke (a), Lord Eldon alluded to the power of a Court of Equity so to execute articles, or an executory agreement, as, consistently with the intention of the parties, to provide substantially against the husband's insolvency; but whether the Court had such a power to alter or modify a settlement, a deed executed and complete, and having nothing executory about it, in order to effectuate such intention, seems to have been doubted previously to the year 1810, when, for the purpose of settling the question, Lord Manners, Chancellor of Ireland, consulted Lords Eldon and Redesdale upon the following case, whether, when it appeared that the intention, upon executing a settlement, was that the fortune of the wife should be a provision for her, but by mistake it was made to appear the property of the husband, it was their Lordships' opinion, that the deed of settlement could be so far corrected to meet the intention of the parties, as to amend the mistaken form of the deed, and mould it so as to be a valid settlement? Both opinions having agreed in the power of a Court of Equity to make such correction and alteration, Lord Manners acted upon them, and the point appears to be now so settled. (b)

15. In *ex parte* Dicken (c), a marriage settlement recited that the intended wife was intitled to freehold, leasehold, copyhold, and personal estate, of the value of 4000*l.*; and that upon the treaty for the marriage, she had agreed to convey, assign, and surrender the freehold, leasehold, and copyhold estates to the husband, in consideration of which he had agreed to pay 4000*l.* to the trustees: the wife then conveyed and assigned the freeholds and leaseholds, and covenanted to surrender the copyholds to the husband, his heirs, &c.: the husband covenanted within six months to pay 4000*l.* to the trustees, to be settled in trust for himself for life, and after his death, for the benefit of the wife and

(a) Stated *antè*, p. 146.

ibid. 260: *Lester v. Garland*, 5 Sim.

(b) *Higginson v. Kelly*, 1 Ball & 223: see *infra*, p. 218.

Beat. 253—256: *Ex parte* Verner,

(c) 1 Buck, 115.

children of the marriage. The copyholds were not surrendered, and the money was not paid: but the wife afterwards joined with the husband in a sale of part of the freehold estate, and on that occasion levied a fine of the whole, declaring the uses of that part to the purchaser, but without declaring any uses as to the remainder. She afterwards joined in another fine, pursuant to a covenant in a trust deed executed by the husband: the trust deed being an act of bankruptcy, a commission issued against the husband. It was held that the trustees had a lien upon the freehold and copyhold estates remaining unsold, for the 4000*l.*, as being the purchase-money agreed to be paid for them, and that they might prove under the commission for so much as those estates should be insufficient to pay. The copyholds, not having been surrendered, were at law vested in the wife, and could not be claimed by the assignees without performance of the husband's covenant. (a) The fines could not affect the interest of the children, and were inoperative as against the wife with respect to the lands remaining unsold, no uses having been declared of the first, and the trust deed leading the uses of the second having become void.

16. In *ex parte* Shute (b), the husband on his marriage gave a bond to trustees to pay them 1200*l.* upon trust for himself for life, with remainder to his intended wife during her life, with the usual limitations to the children of the marriage. On the faith of the bond, the husband was permitted to receive 150*l.* as the marriage portion of his wife. On the husband's bankruptcy, it was held that the trustees were intitled to prove for the 1200*l.* the dividends to be invested in stock, the dividends of which were to be subject to the payment of interest to the wife on the 150*l.*, and the remainder to the husband's creditors for life, and after his death upon the trusts of the bond.

(a) See p. 100. *antè*, and Basevi Bligh, 385; 2 Law J. N. S. Bank. v. Serra, cited there. 25: see also *ex parte* Wright, 3

(b) 3 Deac. & Ch. 1; Mont. & Mont. & Ayr. 387; 2 Deac. 551.

17. We may here notice the late case of *Manning v. Chambers* (a), where, by a settlement, trustees were directed to stand possessed of a sum of stock^x on trust for the settlor for life, and after his decease, on trust to pay the dividends to B for his life, or *until he should become bankrupt*; and, on his becoming bankrupt, then to pay the dividends to the wife of B for her life, for her separate use. Seven days *before the date* of the settlement, a fiat in bankruptcy issued against B., who obtained his certificate. The settlor having afterwards died, it was held that B's wife, to the exclusion of his assignees, was intitled to the dividends for her separate use for life.

(a) 16 Law J. N. S. Chan. 245.

CHAPTER V.

OF THE EFFECT OF SETTLEMENTS WHERE THE WIFE IS AN INFANT.

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| 2. <i>Personal estate in possession and leaseholds bound by settlement.</i>
3. <i>Not real estates.</i>
4. <i>Principle upon which wife's personal estate bound.</i>
6. <i>Where settlement binding on wife surviving.</i>
7. <i>Settlement of choses in action not binding on wife.</i>
8. <i>Of property settled to her separate use.</i> | 9. <i>Effect of consent of parents or guardians.</i>
10. <i>Where settlement made with approbation of the court.</i>
11. <i>Settlement of wife's real estate binding on husband.</i>
12. <i>And on wife electing to take under settlement.</i>
13. <i>Whether settlement of real estate of infant husband binding.</i>
14. <i>Settlement of personalty of infant husband.</i> |
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1. It has been seen, that a female infant may be barred of her right to a distributive share of her husband's personal estate, by a settlement made before marriage with the approbation of her parents or guardians. (*a*)

2. A settlement on the marriage of a female infant will also bind her personal estate, which would upon the marriage vest absolutely in the husband, or of leasehold estates which would survive to her, if not assigned to the husband. (*b*)

3. On the other hand, it is now held (*c*), after considerable fluctuation of opinion (*d*), that a settlement on

(*a*) Vol. I. p. 457, *antè*.

(*b*) *Trollope v. Linton*, 1 Sim. & Stu. 477.

(*c*) *Durnford v. Lane*, 1 Bro. C. C. 106: *Milner v. Lord Harewood*, 18 Ves. 259: *Trollope v. Linton*, *ubi sup*.

(*d*) See *Cannel v. Buckle*, 2 P.

W. 243: *Harvey v. Ashley*, 3 Atk.

607: *Lucy v. Moore*, 4 Bro. P. C. 343, ed. Toml.: *May v. Hook*, Co.

Litt. 246 *a*, note: *Peirson v. Peirson*, cited 1 Bro. C. C. 115: *Clough v. Clough*, *Wooddeson*, vol. 3. p. 453;

5 Ves. 710: *Simson v. Jones*, 2

Russ. & M. 374.

the marriage of a female infant will not bind her real estates.

4. In many of the earlier cases, an opinion prevailed that parents and guardians had a general authority to bind the property of infants, by agreements on their marriage; and that agreements of this nature were to be in all cases established, if fair and reasonable. This opinion, which in a great measure influenced the decision of *Drury v. Drury*, has been shaken by the cases which have settled that the infant's real estate cannot be bound; and the principle upon which the personal property is now held to be bound seems to be, that the marriage vests it in the husband, or places it under his control, and that it therefore becomes subject to the covenants entered into by him in the articles.

5. Thus, in *Williams v. Williams (a)*, the husband had reduced the personal estate into possession, and Lord Thurlow held that it must be applied on the trusts of the settlement, "the husband having covenanted that what should come to him should be bound by the articles." (*b*)

6. Upon this principle the settlement will not, in the event of the wife surviving, be binding on her, with respect to her choses in action, or to any reversionary or contingent interest which cannot vest in the husband, or which do not come within his power during the coverture. (*c*)

7. It was held in an early case (*d*), that a settlement of the choses in action of a female infant was binding upon her although they were not reduced into possession during the coverture. But this case can no longer be considered an authority, and it has been directly overruled by *Le Vasseur v. Scrutton. (e)*

(a) 1 B. C. C. 152.

(d) *Harvey v. Ashley*, 3 Atk.

(b) See also 5 Madd. 164: 1 S. & St. 485: and 1 Ves. Sen. 377.

613: see also *Trollope v. Linton*, 1 S. & St. 476.

(c) See *Ellison v. Elwin*, 13 Sim. 309: *Ashton v. M'Dougall*, 5 Beav. 56: *Medcalfe v. Ives*, 1 Atk. 63: *Bush v. Dalway*, 1 Ves. Sen. 19; 3 Atk. 530: and 1 B. C. C. 111.

(e) 14 Sim. 116: see also *Hastings v. Orde*, 11 Sim. 205.

8. Upon the principle that the settlement is that of the husband, and not of the wife, a settlement on the marriage of a female infant of personalty which is already settled to her separate use will not be binding on her. (*a*)

9. On the same principle, if the settlement, so far as relates to the personal property of the wife, derives its effect from the covenant of the husband, the assent of the parents or guardians will not be in all cases indispensable. (*b*)

10. It has been held that a settlement which is not binding upon a female infant, does not become so by being made with the approbation of the Court. (*c*)

11. With respect to a marriage settlement of a female infant's real estate, though not binding upon her, it will be binding upon the husband, and will therefore prevent him from joining in any other disposition of the estate during the coverture. (*d*)

12. It will also, upon the principle of election, become obligatory upon the wife or her heirs on accepting other benefits under it. (*e*)

13. If the husband be an infant at the time of the marriage, it may be presumed, for the same reasons which apply to the case of a female infant, that a settlement of his real estate would not now be held to bind him: there are two cases in which a different view of the question appears to have been taken (*f*), but it is possible that they may have turned upon acts confirming the contract done by the husband when of age.

(*a*) *Simson v. Jones*, 2 Russ. & M. 365: and see *Johnson v. Johnson*, 1 Keen, 648. Jur. 577: and *Milner v. L. Harewood*, 18 Ves. 276.

(*b*) 1 Bro. C. C. 111: see *supra*, vol. I. p. 462, and p. 107. of this volume. (*e*) 18 Ves. 276: 1 Bro. C. C. 111: see 3 Atk. 613.

(*c*) *Simson v. Jones*, 2 Russ. & M. 377. (*f*) *Strickland v. Coker*, 2 Ch. Cas. 211, cited 3 Atk. 614: *Warburton v. Lytton*, 1764, cited in *Lytton v. Lytton*, 4 Bro. C. C. 440:

(*d*) *Durnford v. Lane*, 1 B. C. C. 106: see also *Pimm v. Insall*, 12 see *Slocombe v. Glubb*, 2 Bro. C. C. 545.

14. The principle on which the validity of marriage settlements of the personal property of female infants appears to rest, does not apply to similar settlements of the personal property of male infants.

15. The subject of settlements where the infants are wards the Court of Chancery has been already considered. (*a*)

(*a*) Chap. 13. sect. 4, *antè*.

CHAPTER VI.

OF THE HUSBAND'S COVENANT TO LEAVE OR SETTLE UPON HIS WIFE PERSONAL ESTATE; AND OF THE PERFORMANCE AND SATISFACTION OF SUCH COVENANTS.

SECTION I.

OF THE HUSBAND'S COVENANT TO SETTLE ALL THE PERSONAL ESTATE OF WHICH HE WAS POSSESSED AT THE TIME OF THE COVENANT.

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| <p>2. <i>Personalty bound from date of covenant, semble.</i></p> <p>3. <i>Effect where personalty invested in land.</i></p> | <p>4. <i>Lewis v. Madocks.</i></p> <p>6. <i>Randall v. Willis.</i></p> <p>8. <i>Observations thereon.</i></p> <p>9. <i>Mr. Jacob's remarks.</i></p> |
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1. It sometimes occurs that a husband previously to his marriage covenants or otherwise engages to convey or settle in favour of his wife, or of her and their children, all the personal estate of which he was possessed at the time of the covenant or engagement.

2. Mr. Roper considers the effect of such a covenant to be to change the ownership of the property from the execution of the articles, and that the husband ceases to have any interest in it from that period. (a)

3. "In such a case," he adds, "if the proceeds of that estate be afterwards laid out by the husband in the purchase of real property in his own name, or otherwise, without reference to the trusts subsisting under the articles, the

(a) 2 Rop. H. & W. 30. Mr. Roper refers to *Campion v. Cotton*, 17 Ves. 263; and *Garthshore v. Chalie*, 10 Ves. 20.

money so laid out may be followed and demanded out of the real estate for the benefit of the persons intitled to it under the articles ; but, subject to such a lien or charge, the estate itself (as appears to be the better opinion) will, after the husband's death, be considered in equity as belonging to his heir or devisee."

4. Thus, it was decided by Lord Eldon in the case of *Lewis v. Madocks* (a), that where the husband agrees, in contemplation of marriage, to devise, convey, or assure to his wife all the personal estate and effects that he during the marriage shall become possessed of, and he purchases lands with the property subjected to his marriage contract, and dies, such lands will belong to the heir, charged with the amount of the purchase-money in favour of the wife. (b) Upon this subject Lord Eldon expressed himself as follows: "The claim of the wife is put in this way, that personal property bound by the trust or obligation is traced into the purchase of real estate, which estate must therefore be hers. But I do not know of any case in its circumstances sufficiently like this to authorize me to hold that doctrine. I am prepared to say, that the personal estate bound by this obligation, and which has been laid out in this real estate, is personal property that may be demanded out of the real estate ; that the estate is chargeable with it, but that it was not so purchased with it that the estate should be decreed to belong not to the heir but to the wife."

5. In one case, however, which arose upon articles of the above description, the specific lands purchased with the trust money were considered as belonging to the *cestui que trusts* under the articles, and were decreed to be conveyed accordingly.

6. This was the case of *Randall v. Willis*. (c) There the

(a) 8 Ves. 150 : 17 Ves. 48.

(c) 5 Ves. 262 ; Reg. Lib. B.

(b) See *Lane v. Dighton*, Ambl. 1799, fo. 454.

409 : and *Lench v. Lench*, 10 Ves.

516.

husband covenanted in marriage articles that he would, within three months after the marriage, convey, release, surrender, or assure certain estates to the uses therein mentioned, and also all and singular his personal estate of what nature and kind soever." A settlement was executed after the marriage, by which the husband conveyed and assigned all the personal estate and effects of which he was possessed at the time of the execution of the articles to the same uses as the lands were by the articles covenanted and by the settlement actually settled. At the time of the articles the husband was possessed of personal property to the amount of 6000*l*. The husband died; but in his lifetime he invested the proceeds of the personal property in the purchase of lands, which he devised by his will. Upon a question between his surviving wife and the devisee, the Court of Chancery, after declaring the personal estate which the husband was possessed of at the time of the articles, and had been invested in the purchase of lands, to be subject to such articles, ordered the *specific lands* so purchased to be conveyed to the wife, and directed an account of the rents which had been received by the husband's devisee.

7. Mr. Roper doubts whether this case can be considered as an authority, on the ground that there was no covenant by the husband to invest in lands, so that no *lien* was created in favour of the wife (*a*); and considers that it cannot be reconciled with the case of *Lewis v. Madocks*. (*b*)

8. The cases, however, seem to be distinguishable. In *Randall v. Willis*, the Court exercised its usual power of rectifying settlements made in pursuance of articles by making such a decree as it would have done if the settlement had contained the proper proviso as to lands purchased. In *Lewis v. Madocks*, where the husband had given a bond "to

(*a*) 2 Rop. H. & W. 32.

(*b*) Ibid. 33.

devise, convey, or assure" his personal estate, the Court had not the power of thus interfering, no settlement having been made in pursuance of the bond, and the case not being one of articles necessarily to be carried into effect by a formal settlement, as the husband had reserved to himself the option of devising the property instead of conveying it. In this case, therefore, there was no ground for holding that the specific estates purchased with the money belonged to the *cestui que trusts*.

9. Mr. Jacob, after noticing that the covenant in *Randall v. Willis*, which had been inaccurately cited by Mr. Roper, was in the words in which it has been just stated, observes: — "This covenant was spoken of in *Lewis v. Madocks* (a) as one which attached upon the personal estate of which the husband was then possessed, or of which he might be possessed, within the three months. But from the judgment of the Lord Chancellor, it appears that he put a different construction upon it; he thought that it obviously could not mean that there should be a specific settlement of every article of personal estate, that, within the period allowed for making the settlement, the husband might be possessed of. His Lordship's view of the meaning of the covenant appears to have been, that it applied to the residue of the personal estate of which the husband should be possessed at his death; but that in order to prevent him from disappointing its object, the settlement made in pursuance of the articles ought to have contained a proviso, that any real estate which he might purchase should be considered as personalty for the purpose of the settlement. (b) If this view was correct, it followed that any estates which the husband had purchased were to be treated in the same manner as if the settlement had contained that proviso. The language of the decree is not strictly conformable to the opinion expressed by the Court: this may perhaps have arisen from the frame of the bill, the prayer

(a) 8 Ves. 150.

(b) 5 Ves. 274.

of which extended only to lands purchased with the personal estate of which the husband was possessed at the date of the articles. The decree does, not however, adopt the notion that the covenant attached upon all the personal estate at that time: for on that supposition it would have been declared that the widow was to stand as a creditor for so much of the personal estate of which the husband was then possessed, as had not been laid out in land. The decree, however, proceeds to direct the usual accounts of his personal estate possessed by his executrix, and of his debts, apparently on the idea of the widow being intitled under the covenant to the residue of his personal estate at the time of his death, after payment of his debts." (a)

SECTION II.

OF THE HUSBAND'S COVENANT TO SETTLE ALL THE PERSONAL ESTATE OF WHICH HE SHOULD BE POSSESSED DURING THE MARRIAGE. *argued.*

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| <p>1. <i>Effect where personal estate subject to covenant invested by husband in land.</i></p> <p>2. <i>Lewis v. Madocks.</i></p> | <p>3. <i>What personal estate subject to covenant.</i></p> <p>4. <i>Effect where husband borrows money and invests in land.</i></p> |
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1. It was decided in *Lewis v. Madocks*, as was stated in the preceding section, that where the husband has agreed to settle the personal estate which he should be possessed of during the marriage, and he lays out the personal estate in lands, the lands will belong to the heir, charged with the amount of the purchase-money in favour of the wife.

2. In that case the husband by his bond previously to

(a) 2 Rep. H. & W. 31 n.

marriage engaged to devise, convey, or assure all such goods, chattels, personal estate, and effects as he at any time during the joint lives of himself and his then intended wife should be possessed of, to their joint use, and to the use of the survivor of them for ever. He, after the marriage, purchased lands for 1600*l.*, such sum being made up of 600*l.* his own money, and the residue, viz. 1000*l.*, with 21*l.* for the expenses attending the purchase, being borrowed by him upon his own personal security. Of the 1021*l.* borrowed, the husband discharged 500*l.*, and died, leaving 521*l.* unsatisfied. He also, during his life, expended 600*l.* in building a dwelling-house, and in lasting improvements upon the estate. His widow and executrix paid about 186*l.* in discharge of his remaining debts, funeral and testamentary expenses; and she, before a second marriage, laid out 353*l.* in repairs and lasting improvements upon the purchased lands, and in redemption of the land-tax; into the possession of which lands she had entered upon her husband's death. The husband's personal estate at his decease was 573*l.* Lord Eldon decided that the 600*l.*, the husband's own money, and the 500*l.* borrowed, but afterwards paid off by him, were on the same footing, and were to be considered as his personal estate laid out, and that the remainder of the sum borrowed and not discharged was to be considered the debt of the purchased estate; that as to lasting improvements made by the widow, since the money advanced by her on that account was *bonâ fide* laid out, she was intitled to an inquiry as to it; and with respect to the 186*l.*, his Lordship held that such sum did not fall within the obligation, observing, "that a great proportion of the debts, about 186*l.*, consisted of such particulars, as, in the ordinary course of living in the last year of a man's life, he would incur, with the exception of some small quit rents, but which also would be due from him in the course of a proper application of his income, and that they and such particulars could hardly be represented as debts incurred, so as that the payment of them would be a

breach of the husband's obligation under the bond; that it would be entering into impracticable minuteness to give the wife credit against the real estate for any of the items paid in that schedule;" and his Lordship concluded with the observation, "that if persons would enter into an engagement so difficult in construction and application, they must not expect from a court of justice relief so minute in that respect." The final decree declared that the widow was intitled to the 600*l.* and 500*l.*, with interest from her husband's death; and inquiries were directed as to other matters.

3. What power remains with the husband over his personal estate, after entering into so loose and indefinite a covenant as that in *Lewis v. Madocks*, depends, as Mr. Roper remarks, upon the construction of the covenant as to what personal property it attaches, when the parties themselves have been silent upon the subject. "Such a covenant," he observes (*a*), "is very difficult to execute, yet a Court of Equity will perform it so far as it is able. When it finds a solid subject of personal estate during the marriage, it will attach it to the covenant, rather than render such covenant altogether nugatory. But to expect that a court of justice, in the construction of such a covenant, should descend to the *minutiae* of every petty receipt and expenditure of the husband during the marriage for the purpose of binding them by the contract, would be unreasonable. The covenant, however, will be considered as embracing every species of personal property which the husband shall become possessed of during the coverture, falling under the denomination of principal or capital, but not income arising from capital, expended by the husband in the usual mode of applying such species of property, as for the support and comfort of himself, wife, and family, and in the discharge of debts contracted for those purposes. Lord Eldon accordingly observed during the argument of the case of *Lewis v. Madocks* (*b*);

(*a*) 2 Rop. H. & W. 36.

(*b*) 17 Ves. 55.

‘that he could not adopt the construction that annual produce, for instance, dividends of stock, was property acquired during the coverture in the sense of the bond, except only to the extent in which the husband himself might think proper to lay up that produce as capital, otherwise that he and his wife would not be at liberty to expend one shilling.’ From this exception it is to be inferred that annual income expended otherwise than in the usual and customary manner, as above, will not be exempted from the operation of the covenant, as if it be applied in the discharge of gross sums of money which the husband had borrowed; because those sums from their nature being to be considered as capital received by him during the coverture, and therefore within the compass of the covenant, the money of the husband applied in their discharge must be considered as partaking of the nature of the debt liquidated, and treated by him as savings and capital. Savings from income, therefore, may form capital, and for that reason be comprehended within the terms of the covenant; and to that effect Lord Eldon expressed an opinion in *Lewis v. Madocks*, observing that if a sum of 500*l.* which had been borrowed and discharged by the husband, had been paid by him out of his savings, His Lordship was of opinion that such sum *primâ facie* would be personal estate within the husband’s agreement, as having been applied in paying debts. (a)”

4. Upon the widow’s right where her husband having entered into such a covenant borrows money, and invests it in land, Mr. Roper observes (b): “Since money borrowed is to be taken as personal estate acquired by the husband during the marriage within the terms of this his covenant, if the husband take up money upon his personal security, and invest it with part of his own in the purchase of lands, and he afterwards discharges the money lent to him, his widow will be intitled to reimbursement out of the purchased

(a) 17 Ves. 58.

(b) 2 Rop. H. & W. 37.

estate, with interest from his death; or if it remain unpaid at his death, it would seem that she is intitled to have it discharged out of the real estate." In such cases, who is to satisfy the claim of the creditor is a question between the widow and her husband's heir or devisee. Upon this point Lord Eldon put the following case in that of *Lewis v. Madocks* (a): 'Suppose the husband, possessing 600*l.*, had borrowed 600*l.*, and bought an estate of the value of 1200*l.*, and died that moment. If the former sum be to answer for the money borrowed, the wife gets nothing by the covenant under such circumstances. I incline to think that the money borrowed must be considered personal estate of which he was possessed. At least that point is fit for discussion, that the husband having borrowed the money, became possessed of it; that all which he had possessed became subject to the uses of the settlement, but as personal estate; and then the widow would with propriety be called upon to pay the 600*l.*, for she would have the other for her own benefit.'

"The subject last considered was the equity of the widow under the covenant, as against the husband's heir or devisee, when part of the money invested in the purchase of lands was borrowed upon his personal security, and afterwards paid off by him before his death, or left by him subsisting at that period. But it may be asked, whether the nature of the creditor's security will alter that equity? And it is presumed that it will not. In the first case it is conceived that the personal estate of the husband applied in discharging such security (supposing it to be a mortgage of the estate), ought to be made good out of the property purchased, since such personalty was bound by the prior covenant or agreement of the husband to make the settlement; and, in the second case, that although the mortgagee should obtain payment of his debt out of the husband's personal assets

(a) 8 Ves. 157.

bound by the covenant, yet that in equity the widow would have a right to be refunded out of the lands purchased the amount of the personal estate so applied."

SECTION III.

OF THE HUSBAND'S COVENANT THAT HIS WIFE SHALL HAVE, OR THAT HE WILL LEAVE TO HER THE WHOLE OR PART OF THE PERSONAL ESTATE WHICH HE SHOULD BE POSSESSED OF OR INTITLED TO AT HIS DEATH.

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| <p>1. <i>What property subject to covenant.</i></p> <p>4. <i>Husband may defeat covenant by disposition in his life.</i></p> <p>5. <i>But disposition must be complete.</i></p> | <p>6. <i>And no interest reserved to husband.</i></p> <p>10. <i>Effect of partial gift to wife absolutely intitled under covenant.</i></p> |
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1. THE property to which such covenant attaches is the whole or a proportion of the clear personal estate of the covenantor at his death, *i. e.* upon the residue after payment of all his debts and funeral expenses. It differs so far in effect from the preceding covenant, that the husband is at full liberty during his life to sell, alien, dispose of, or incumber the whole of his personal estate, and utterly to defeat his covenant; yet his engagement is quite consistent with this construction; it only stipulates that the whole or part of that which can be considered his personal property shall be subject to its operation, which is only so much as may remain after all his other *bonâ fide* obligations shall have been satisfied. (a)

2. In *Cochran v. Graham* (b), a deed, executed upon a separation agreed upon between husband and wife, contained a proviso, that if she survived him, and they were at that

(a) 10 Ves. 20.

(b) 19 Ves. 63.

time living apart according to the instrument, then that she should be intitled to receive her dower, and thirds of all the real and personal estates whatsoever of which he should die seised or possessed during the marriage. They lived separate until the husband's death, who by will bequeathed to her one shilling only, and disposed of the whole of his personal property, and appointed executors. A question arose upon the construction of the proviso, viz. whether it was an absolute agreement of the husband to leave his wife such a portion of his personal estate as she should be intitled to under the statute of distribution, if he had died intestate, or merely to place her in the same situation, in regard to her dower and thirds, as if she had not been living apart from him ; for if the former was the construction, then she would be intitled to her distributive share of his personal estate notwithstanding the will. But Lord Eldon decided, that the meaning of the clause was no more than that, living separate, she should stand precisely in the same situation as if not living apart, with regard to dower and thirds, and consequently that if there had been no separation, since the husband might have barred her interest under the statute by his will, he might equally do so, notwithstanding the terms of the proviso. His Lordship also observed, that if the covenant could be considered as one to leave her such portion of her husband's personal estate as above, he might have spent all his substance, but could not have reserved to himself for his own benefit any part of that which was the subject of such a covenant.

3. So, in the case of *Kirkham v. Needham* (a), the husband previous to marriage settled part of his real estates, and covenanted that he would by will or otherwise, give, devise,

(a) 3 B. & Ald. 531. See also as to the effect of covenants of this description, *Cusack v. Cusack*, 5 B. P. C. ed. Toml. 116 : *Prebble v. Bognur*, 1 Swan, 309 ; 7 Taut. 538 : *Willis v. Black*, 1 S. & St. 525 ; S. C. on appeal, 4 Russ. 170 : *Needham v. Smith*, 4 Russ. 318 : *M'Donnell v. M'Donnell*, 4 Dru. & War. 376.

and bequeath all other his real estates, and also all his personal estate and effects whatsoever and wheresoever, to his children. It was decided that this applied only to such real and personal property as he should be possessed of at his death, and that he might therefore without the breach of a covenant sell an estate which he was seised of at the marriage, but which was not included in the settlement.

4. It appears, then, that the husband has the complete ownership and power over his personal property, notwithstanding his covenant; but the exercise of that power must be by a complete act in his lifetime, and not by his will (*a*), because the covenant takes precedency of the will, and such a disposition would be considered a fraud upon his engagement, in analogy to the rule applicable to the like dispositions by a freeman of the city of London, of his personal estate in opposition to his agreement, that it should be distributed according to the custom, which has been before considered. (*b*)

5. But the husband's disposition of his personal property in his lifetime must be complete, an entire departure with all his interest in it, in order to prevent the transaction being set aside as a device to elude his covenant. In requiring this total change of property, the law appears to be strict; for against the husband's diminution of his estate by absolute gift during his life, in fraud of his engagement, the law considers his own interest and convenience a sufficient guard; but it does not draw the same inference or conclusion when, without any diminution of his own enjoyment, he exercises a mere posthumous bounty, although by an irrevocable instrument. The spirit of the covenant requires, that every disposition by him of his personal estate should be excluded which is in effect testamentary, although not such in form. The gift, therefore, or other disposal by the husband of his personal estate, after entering into such a covenant as that under consideration, ought to be absolute and entire; he ought

(*a*) 19 Ves. 71.

(*b*) *Suprà*, vol. i. p. 297.

to part with all his interest, and reserve no partial benefit to himself.

6. If, then, he by deed make an absolute disposition of his personal property, with a reservation to himself of the interest for life, this will be a fraud upon his covenant, an attempt to elude it without inconvenience to himself, by an act in effect testamentary. (*a*)

7. Thus, in *Fortescue v. Hennah* (*b*), a father on the marriage of his daughter covenanted that she, her husband and children, should on his death have a moiety of all the real and personal estate which he should then be seised or possessed of. He afterwards transferred several sums in trust for himself for life, with remainder over: it was held that these sums were subject to the covenant.

8. In *Bradish v. Bradish* (*c*), a husband on his first marriage covenanted that a moiety of whatsoever substance he should be seised or possessed of at his death should go to the children of the marriage. By a deed executed after a second marriage, he assigned part of his property in trust for himself for life, with remainder to his second wife and her children. This was held void as against the children of the first marriage claiming under the covenant.

9. In *Hankes v. Jones* (*d*), a man on his marriage covenanted to give to the children of the marriage a third part of all his chattels, real and personal money, plate, jewels, or any other goods of what nature soever, which at the death of his wife he should be possessed of. Being possessed of a lease for years, he surrendered it, retaking a lease for lives renewable for ever: this was held to be within the covenant.

10. In *Davies v. Davies* (*e*), the husband on marriage covenanted to bequeath to his intended wife, all such goods, chattels, plate, and personal estate of which he should die

(*a*) See *Jones v. Martin*, 3 Anst. 882: Bro. Parl. Cas. ed. Toml. vol. 6, p. 437, vol. 8. p. 242: 5 Ves. 266, note.

(*b*) 19 Ves. 67.

(*c*) 2 Ball & B. 479.

(*d*) 5 Bro. P. C. ed. Toml. p. 136.

(*e*) 10 Law J. Chan. 32.

devise, convey, or assure" his personal estate, the Court had not the power of thus interfering, no settlement having been made in pursuance of the bond, and the case not being one of articles necessarily to be carried into effect by a formal settlement, as the husband had reserved to himself the option of devising the property instead of conveying it. In this case, therefore, there was no ground for holding that the specific estates purchased with the money belonged to the *cestui que trusts*.

9. Mr. Jacob, after noticing that the covenant in *Randall v. Willis*, which had been inaccurately cited by Mr. Roper, was in the words in which it has been just stated, observes: — "This covenant was spoken of in *Lewis v. Madocks* (a) as one which attached upon the personal estate of which the husband was then possessed, or of which he might be possessed, within the three months. But from the judgment of the Lord Chancellor, it appears that he put a different construction upon it; he thought that it obviously could not mean that there should be a specific settlement of every article of personal estate, that, within the period allowed for making the settlement, the husband might be possessed of. His Lordship's view of the meaning of the covenant appears to have been, that it applied to the residue of the personal estate of which the husband should be possessed at his death; but that in order to prevent him from disappointing its object, the settlement made in pursuance of the articles ought to have contained a proviso, that any real estate which he might purchase should be considered as personalty for the purpose of the settlement. (b) If this view was correct, it followed that any estates which the husband had purchased were to be treated in the same manner as if the settlement had contained that proviso. The language of the decree is not strictly conformable to the opinion expressed by the Court: this may perhaps have arisen from the frame of the bill, the prayer

(a) 8 Ves. 150.

(b) 5 Ves. 274.

of which extended only to lands purchased with the personal estate of which the husband was possessed at the date of the articles. The decree does, not however, adopt the notion that the covenant attached upon all the personal estate at that time: for on that supposition it would have been declared that the widow was to stand as a creditor for so much of the personal estate of which the husband was then possessed, as had not been laid out in land. The decree, however, proceeds to direct the usual accounts of his personal estate possessed by his executrix, and of his debts, apparently on the idea of the widow being intitled under the covenant to the residue of his personal estate at the time of his death, after payment of his debts." (a)

SECTION II.

OF THE HUSBAND'S COVENANT TO SETTLE ALL THE PERSONAL ESTATE OF WHICH HE SHOULD BE POSSESSED DURING THE MARRIAGE. *argued.*

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1. It was decided in *Lewis v. Madocks*, as was stated in the preceding section, that where the husband has agreed to settle the personal estate which he should be possessed of during the marriage, and he lays out the personal estate in lands, the lands will belong to the heir, charged with the amount of the purchase-money in favour of the wife.

2. In that case the husband by his bond previously to

(a) 2 Rep. H. & W. 31 n.

this difference was not permitted to repel the legal presumption of performance, which is the case when the question arises upon satisfaction, as will afterwards appear when the law upon that subject is considered.

7. In *Garthshore v. Chalie* (a), Lord Eldon expressed himself in relation to the above two cases to the following effect: "They are distinct authorities, that where a husband covenants to leave or pay at his death a sum of money to a person who, independent of that engagement, by the relation between them, and the provision of the law attaching upon it, will take a provision, the covenant is to be considered with reference to that; and the Court will not look upon the slight difference between leaving and paying, nor whether the payment is to be within three or six months. (b) In that respect there is always a difference upon what is to be taken in a sense at the end of twelve months, but which, I agree, is, in another sense, to be taken from the death of the testator; for the other period is only for convenience, and there is no doubt the property is vested at the death of the party; and if a case were produced in which it was quite clear that there were no debts, the Court would give the fund to the party, notwithstanding there had not been a lapse of twelve months. (c)"

8. It must be noticed, that the covenants in the above two cases of *Blandy v. Widmore*, and *Lee v. D'Aranda*, could not, from their construction, be broken during the husband's life. There was therefore no obligation upon him to make any appropriation or settlement before his death. The money to be received under the covenants, and the wife's distributive share, were duties which became payable after the husband's decease; so that the law presumed the latter to be left by the husband to arise out of his estate after his decease, in

(a) 10 Ves. 13.

(b) Which occurred in the two stated cases of *Blandy v. Widmore*, and *Lee v. D'Aranda*.

(c) See Lord Eldon's observations upon the two cases referred to in the last note, in the case of *Twisden v. Twisden*, 9 Ves. 426.

performance of his covenant, which was to be discharged out of the same estate. But if either of the covenants had been so framed as to have required the money to be settled at a period during the husband's life, and there had been a breach of it before his death, then he would have incurred a debt to the widow, which would have converted the question from one of performance into that of satisfaction, and in such case, according to the rule applicable to that doctrine (as it will afterwards appear), the debt could only be satisfied by something equally certain and beneficial. According to this distinction between performance and satisfaction, Sir Joseph Jekyll determined the case of *Oliver v. Brigland* alias *Brig-house* (a), in which the husband covenanted to pay for the benefit of his wife a sum of money within two years after the marriage, and that if he died his executors should pay it. He after surviving those years died intestate, and his widow's distributive share of his personal estate was larger than the sum covenanted to be settled upon her; yet since such share was of uncertain amount, and might or might not have equalled in value the debt under the covenant, his Honour decreed that it should not be taken in satisfaction of such debt, but that the widow should have both of them.

9. It is necessary to remark that the case of *Kirkman v. Kirkman* (b), determined by Lord Thurlow, does not impugn the authorities of *Blandy v. Widmore*, and *Lee v. D'Aranda*, although his Lordship does not appear to be thoroughly reconciled to them. That case was decided upon the proviso in the settlement, from which it was inferred that the legal presumption of performance was negatived, since the husband expressly stipulated that nothing therein-before contained, nor any provision thereby made or intended for the wife should, or should be construed to deprive her of any legal or customary rights to which she was or might become intitled; nor deprive her from taking any provision

(a) Cited 3 Atk. 420, and 1 Ves. Sen. 1.

(b) 1 Bro. C. C. 96.

which he might give, bequeath, or leave her in any manner. It was therefore clear, that her interest in his personal estate arising from his intestacy could not be, nor be considered, a performance of his covenant in the settlement to leave her at his death, or that his executors should pay to or for her use, either of the sums mentioned in it.

10. In *Garthshore v. Chalie* (a), Lord Eldon acted upon the two cases of *Blandy v. Widmore* and *Lee v. D'Aranda*. There A, the husband, before his marriage with B, covenanted that, if he died before her without leaving a child then living or in *ventre sa mère*, his heirs, &c. should, within six months after his death, pay, assign, &c. to or for the benefit of B five eighth parts of such real and personal estates as he should be seised of or intitled to at his decease, or if B survived him, and there should be a child of the marriage living at his death, or born alive afterwards, then that his or her heirs, &c. should pay, assign, &c. to and for the benefit of B one half part of such real and personal estates as before mentioned. There was issue of the marriage living at A's death, and A died intestate in the lifetime of B. The question was, whether B's distributive share under the statute of distribution was to be considered a performance of A's covenant, *i. e.* whether B was intitled first to a moiety of his personal estate under the covenant, and also to one third of the remainder under the statute. And Lord Eldon determined that B could only claim one-half of her husband's personal estate which he was possessed of at his decease; and consequently that what she took by operation of law in consequence of her husband's intestacy, was to be considered in performance of his covenant, and that she could not claim both.

11. It will not have escaped the reader's observation, that this case differed from the preceding authorities in the circumstance that the property did not merely consist of per-

(a) 10 Ves. 1: and see *Hamilton v. Jackson*, 2 Jones & Lat. 295.

sonalty, but of real and personal estates; and that the widow was not the only person in contemplation at the time when the covenant was entered into, but also the children of the marriage, although no express provision was made for them. These differences were not overlooked in the judgment, but they were considered to be insufficient to take the case out of the principle upon which the before-mentioned cases were decided.

12. Sir Thomas Plumer, M. R., proceeded still farther in the case of *Goldsmid v. Goldsmid (a)*, in which he decided, that if the widow take a distributive share of her husband's personal estate, not under an actual but a *quasi* intestacy, such share will be a performance of his covenant, that his executors should pay to her a sum of money at his death if she survived him. In that case the husband, by the articles before his marriage, covenanted, that if he died before his wife, his executors, &c. should, within three calendar months next after his decease, pay to her 3000*l*. He then made a will, and after directing his debts to be paid, appointed four persons his executors, to whom he gave all his personal estate. He next directed that so much of his capital in business as should not be necessary to pay his debts, funeral expenses, charitable gifts, and for the support of his wife and family, should continue in it for three years, and then upon trust to divide the whole of his personal property in such ways and proportions as they thought right. He declared that if any of his family disputed the distribution, and proceeded to implead his executors in respect of it, such persons should be excluded from every benefit under his will. Two of the executors died before him, a third renounced the probate of the will, and the fourth executor proved it, but never undertook the discretionary trusts, which under the circumstances could not be performed; so that the testator's residuary personal estate was necessarily to be distributed

(a) 1 Swanst. 211.

amongst his next of kin in the proportions directed by the statute of distribution. His Honor determined that the distributive share was a performance by the husband of his covenant. The foundation of the decree was that the widow having taken after her husband's death, in the events which happened, precisely the same share of his personal property as she would have done had he died actually intestate, the case was to be classed in principle with the preceding authorities.

13. Upon this case the following observations are made by Mr. Roper (*a*): "It appears from the cases and the doctrine to be collected from them that this species of performance is a presumption of law arising upon the permission of the party leaving that to be done by the law in the distribution of his property which he would otherwise have done himself, and is founded upon the single circumstance that the party has abstained from doing any act whatsoever in regard to his estate. In such a case, the law raises a presumption that the share which provides for the widow was intended by her husband in performance of his covenant. It further appears that the presumption may be repelled by parol evidence. (*b*) These things being so, the principle of performance does not seem to apply to the last case, because the covenantor was not merely passive, but active, since he disposed of all his personal estate by will, and did not permit its distribution by dying legally and actually intestate. On the contrary, he meant to dispose of the whole of his estate, which disposition was alone prevented by accidents occurring after his death; hence there is stronger evidence than that by parol to repel the legal presumption of intended performance."

14. "But it may be doubted," as Mr. Jacob remarks (*c*), "whether this reasoning can correctly be applied to cases relating to the performance of the husband's covenant by a distributive share of his property devolving on his wife.

(*a*) 2 Rop. H. & W. 50.

(*c*) 2 Rop. H. & W. 50 n.

(*b*) 10 Ves. 10.

These cases do not seem to depend on any presumption of the husband's having purposely died intestate. They turn upon the question, whether the share which the wife receives is a substantial compliance with the intention of the covenant: the Court for this purpose putting on the covenant an enlarged construction, with reference to the relation between the parties, and considering the intention to be that she shall receive the sum contracted for 'without regarding the manner how;' (a) the question depends, therefore, merely upon the intention of the covenant, a point upon which it would be difficult to contend for the admissibility of extrinsic evidence. The passage in 10 Ves. 10, referred to by Mr. Roper, where the Lord Chancellor speaks of receiving parol evidence, alludes to cases on the performance of covenants to purchase and settle estates,—a class of cases essentially distinct, depending on the presumed or actual intention with which the purchase is made." (b)

15. If the husband's covenant be entire, and the provision therein expressed to be secured to the wife is such that the covenant might be held to be in part performed by the widow's distributive share under her husband's intestacy, according to the preceding cases, and the remaining part could not be so considered; then since the covenant is entire the Court will not split it, and hold a performance and a non-performance at the same time.

16. Thus, if the husband covenants with trustees that his heirs, &c. should pay to them 6000*l.* within a certain period after his death; upon trust as to 1500*l.* part of the sum for his widow absolutely if she survived him; and as to the remaining sum of 4500*l.*, to pay the interest of it to her during her life or widowhood, since the last sum, not given absolutely to the widow, could not be considered satisfied by her distributive share; neither could the 1500*l.* be so considered, although she took an absolute interest

(a) 1 Ves. Sen. 1.

(b) See chap. 20. sect. 8. *antè*.

in it. This was the ground of the decree in *Couch v. Stratton*. (a)

17. But it will be no ground of objection to the application of the doctrine of performance, that the widow's distributive share is less than the amount of her provision under her husband's covenant, as it is in the instances of satisfaction after mentioned; because the intention of the husband to perform his covenant by permitting a portion of his property to devolve upon his widow, being an inference of law upon that permission when the two interests are of equal value or the latter more; the inference is continued when the share is inferior in amount to the sum provided by the covenant; so that if the money covenanted to be paid by the husband's executors, &c. be 1000*l.*, and the widow's distributive share amount only to 500*l.*, such share will nevertheless be a part-performance of the covenant, viz. to the extent of 500*l.*

18. The reasonableness of this presumption appears from a supposed case put by Lord Eldon in the case of *Garthshore v. Chalie*. (b) His Lordship said that "the Court adverting to the circumstance that the widow will take part of her husband's property at his death, it is difficult to say that if she receive 1000*l.* in discharge of 1000*l.*, her residuary share, she takes it in satisfaction of 1000*l.* covenanted to be paid to her, as it is the full amount; but that if such share amount only to 999*l.*, she shall not merely have the additional pound, but the sum of 1999*l.*, for that must be the consequence, where the residue may be only 2000*l.*, and she may be contending with others than her children. That is not the natural or legal meaning of such a covenant."

19. The widow's distributive share, however, will not be a performance of her husband's covenant that his executors shall raise an annuity out of his estate and pay it to her for her life. This point was so settled in the late case of *Salisbury v. Salis-*

(a) 4 Ves. 391.

(b) 10 Ves. 16.

bury. (a) Sir J. Wigram, V. C., remarked that the principle laid down in the cases of *Blandy v. Widmore* and *Lee v. D'Aranda*, and afterwards recognised by Lord Eldon in *Garthshore v. Chalie*, and by Sir Thomas Plumer in *Goldsmid v. Goldsmid*, had settled the practice of the Court in cases where the covenant was to leave, or that the executors should pay, a gross sum, and that it was difficult to see a distinction in the case of an annuity. The question, however, arose whether the case of *Couch v. Stratton* was not an authority directly the other way. In that case, the cases of *Blandy v. Widmore* and *Lee v. D'Aranda* were both cited, and the whole question was argued by counsel of eminence. Lord Eldon had nevertheless expressed an opinion that the rule adopted by the Court in the case of a covenant to pay a gross sum was inapplicable to the case of a covenant to leave an annuity. That being so, he felt bound, though unable to distinguish the two cases in principle, to follow *Couch v. Stratton*, putting the case of course upon performance.

(a) 12 Jur. 671.

SECTION V.

OF THE SATISFACTION OF COVENANTS AS DISTINGUISHED FROM
THE PERFORMANCE OF THEM.

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| 1. <i>Distinction between satisfaction and performance.</i>
2. <i>No satisfaction where bequest less in amount than sum under covenant.</i>
3. <i>Nor if bequest contingent or payable later.</i>
4. <i>Haynes v. Mico.</i>
5. <i>Mr. Jacob's remarks thereon.</i>
6. <i>Adams v. Lavender.</i>
7. <i>Remarks thereon.</i>
8. <i>Bequest payable earlier and of equal amount a satisfaction.</i> | 9. <i>No satisfaction where the provisions of different nature.</i>
12. <i>Nor where bequest expressed to be made from particular motives.</i>
13, 19. <i>Whether a bequest of a share or a residue is a satisfaction.</i>
20. <i>Effect of gift of residue to two persons equally.</i>
21. <i>Gift of residue not uncertain in amount a satisfaction.</i>
22. <i>Where residue exceeds covenant.</i>
23. <i>Parol evidence.</i> |
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1. THERE is an important distinction between satisfaction and performance. Satisfaction, to use the language of Sir W. Grant (*a*), presumes intention; it is something different from the subject of the contract, and substituted for it; and the question always arises, was the thing done intended as a substitute for the thing covenanted? a question entirely of intent; with reference to performance the question being—has that identical act which the party contracted to do been done?

2. If the testamentary disposition to, or in favour of the wife, be inferior in value to the husband's covenant or obligation, the former will not be presumed or considered to have been given in satisfaction or in part satisfaction of the latter; but the benefit which she takes under her husband's

(*a*) In *Goldsmid v. Goldsmid*, 1 Swanst. 219.

testament will be inferred to have been bequeathed to her as a bounty, and accumulative. (*a*)

3. If the testamentary disposition be not so beneficial to the wife as her interest under the covenant or obligation of her husband, as when the legacy given to her depends upon a contingency (*b*); or where such legacy and the provision by covenant or agreement are payable at different times, and the latter is due at an earlier period than the former; these variations between the two provisions will repel the inference of satisfaction.

4. An instance of the latter kind occurred in the case of *Haynes v. Mico* (*c*); the husband, upon his marriage, entered into a bond to trustees to leave his intended wife 300*l.*, payable in a month after his death, if she survived him. He, by will, gave to her 500*l.*, payable within six months after his decease. The question was, whether the legacy was to be taken in satisfaction of the 300*l.* secured by the bond? And Lord Thurlow decided in the negative; his Lordship observing, that in *Clark v. Sewell* (*d*), Lord Hardwicke laid down the rule, that where there was a difference in any circumstance, between a legacy and the debt or obligation, the former should not be deemed a satisfaction; therefore, in that case, the debt being payable in one month, and the legacy in six months, made a clear distinction, and repelled any presumption of an intention in the testator to pay the debt.

5. "It will be observed," as Mr. Jacob remarks (*e*), "that in this case the legacy differed from a literal compliance with the covenant, only in the time at which it was made payable, and on account of that difference it was held not to be a performance. This appears at first sight inconsistent with the cases relative to the performance of covenants by the devolution of a distributive share, on the covenantor's intestacy, in which, as it has been seen, such slight circum-

(*a*) 1 Ves. Sen. 263.

(*d*) 3 Atk. 96.

(*b*) 2 P. W. 553: 2 Atk. 426.

(*e*) 2 Rep. H. & W.

(*c*) 1 Bro. C. C. 129.

stances of difference have not been regarded. (a) And the case of *Haynes v. Mico* has therefore been sometimes questioned. (b) There is, however, this distinction between the performance of a covenant by a legacy, and by a distributive share: that the legacy '*primâ facie* imports a bounty and intention of kindness, absent in the case of intestacy' (c): it must be considered as a voluntary gift, unless there be 'strong circumstances of a contrary intention.' (d) Hence, although the legacy be given so that it may be regarded as in substance a performance of the intention of the covenant, it is taken to be an additional bounty, unless the will raises the presumption that the testator gave it for the purpose of satisfying his obligation,—a presumption which is in general repelled by small variations between the bequest and the obligation. On the other hand, in cases of intestacy, there can be no intention of bounty; and, therefore, the only question is, whether the meaning of the covenant is in substance complied with."

6. The case of *Haynes v. Mico* was cited with approbation by Alexander, L. C. B., in the case of *Adams v. Lavender*. (e) In that case the husband upon marriage entered into a bond to trustees to pay to them in his lifetime, or immediately after his death, 500*l.*, in trust, subject to their own costs, charges, and expenses, for his wife for life, and after her death for their issue, and, in default of issue, for his wife for her own use. By will, after directing full payment of all his debts, he gave her 1000*l.*, payable within six months after his decease. It was held that the bequest of the 1000*l.* was not a satisfaction of the 500*l.*, secured by the bond.

7. In this case, however, the presumption that the bequest was not made as a satisfaction was stronger than in *Haynes v. Mico*, as the testator here directed all his debts to be paid, without exception of that created by the bond, which showed

(a) *Antæ*, p. 172.

(b) See 4 Madd. 331.

(c) 10 Ves. 17.

(d) 2 Bro. C. C. 395.

(e) *M'Clelland & Younge*, 41.

that he did not intend the legacy to be a satisfaction of it. Moreover, as in *Devese v. Pontet*, there might have been other persons than the wife to a greater extent interested in the bond debt.

8. But if the legacy be payable at an earlier period than the sum covenanted to be paid, and be of equal amount, it will be a satisfaction; and the presumption that it was so intended will not be repelled by a direction in the will, that all the testator's debts shall be paid. (a)

9. If the property bequeathed to the widow, and the interest that she is intitled to under the covenant or obligation of her husband, be of different natures, or for different interests, as if the provision by covenant or agreement be money, and that by will be of lands, or the wife's estate under the former be absolute, and her interest under the latter be for life only; these circumstances will also be sufficient to repel the inference of satisfaction. (b)

10. Thus, in *Forsight v. Grant* (c), the husband entered into a bond to pay 2000*l.* within three months after his death, to his intended wife for life, then for their children; but if none, then for his wife absolutely. After this, he by will gave all his real and personal estates to trustees, upon trust to pay the rents and interest to his wife for life, and after that event to divide both real and personal estates among his children, &c. There were no children of the marriage. The question was, whether the widow was intitled to the benefit of the bond, and also to the provision in the will? And it was so decreed; it having been admitted by her opponents, that unless she could be put to an election from some expression in the will, the bequest could not be considered a satisfaction, because under the bond she was intitled to a principal sum within three months after her husband's death, but that under his will she was only in-

(a) *Wathen v. Smith*, 4 Madd. 325.

(b) 2 P. W. 614.

(c) 1 Ves. Jun.

titled to the rents and interest during her life, which were provisions of a different nature.

11. Again, in *Richardson v. Elphinstone* (a), the husband covenanted in marriage articles to pay to his wife, if she survived him, 200*l.* free from all deductions, in the name of a jointure, and 50*l.* to provide herself with a house, yearly during life, to commence at Whitsunday or Martlemas, which should first happen after his death. He by will directed his debts to be paid, and devised to his wife for life a house, with the goods, plate, &c. in it; and he bequeathed his residuary personal estate to trustees, in trust to invest it in stock, and to permit his wife to receive half-yearly 100*l.* annually during her life. Whether these bequests were a satisfaction of the covenant, was the question. And Lord Alvanley, M. R., determined in the negative, and referred to three cases, *Eastwood v. Vinke* (b), *Broughton v. Errington* (c), and *Haynes v. Mico*. (d) His Honour observed: "After these cases (the three to which he referred), it would be presumption for any one sitting where I do to hold this a satisfaction; and when it is considered how much more material it is that certainty should be pursued, than that conjectures should be formed of the intention, and how easy it would be to say it should be in satisfaction if the testator intended it; even were it *res integra*, I should hold that where a man is under an obligation to do an act, and does it not, but performs something else that may by ingenuity be construed a satisfaction, it is safer to say, that it is not a satisfaction. The above three cases are nearly upon the same footing as the case of a bond debt due to a stranger. Here if the testator had the articles in contemplation, it is absurd to suppose he should give a real estate in satisfaction

(a) 2 Ves. Jun. 463.

(d) 1 Bro. C. C. 129, stated *suprà*,

(b) 2 P. W. 614, stated *suprà*, p. 181.
vol. I. p. 494.

(c) 7 Bro. Parl. Ca. 461, 8vo ed.,
and stated *suprà*, vol. I. p. 493.

for half, and an annuity payable and commencing at different times for the other half (provisions so extremely different), without expressing it to be a satisfaction. This, therefore, is no satisfaction of the covenant." (a)

12. Where the two provisions are *ejusdem generis*, and commensurate in interest, yet if the provision by will be expressed to be given for a particular purpose, or from a particular motive, such purpose or motive will prevent the testamentary gift from being a satisfaction of the covenant or agreement (b), because the former was given *diverso intuitu*, which repels the presumption of an intended satisfaction of the latter.

13. If the benefit given to the widow by will consist of the whole or part of the husband's residuary personal estate, it has been decided that such bequest, although it may be eventually of as large or larger amount than the money covenanted or agreed to be paid to or for her by him, or his executors, shall not be a satisfaction of such covenant or agreement; for *non constat* at the date of the will, whether at the testator's death, after all claims upon his property are satisfied, his estate, which is in continual fluctuation till that event happens, will be equally beneficial to the widow as the sum secured to her by the covenant or agreement. It has been therefore inferred from the nature of a residue, and the uncertainty of its amount, that the husband did not intend by such an indefinite bequest that it should operate as a satisfaction of a certain and definite duty. (c)

14. This is the principle upon which Lord Kenyon professed to decide the case of *Devese v. Pontet*, as reported by Mr. Cox and Mr. Finch. (d) In that case the husband covenanted in marriage articles that if his intended wife were

(a) See also *Alleyn v. Alleyn*, 2 Ves. Sen. 37; *Matthews v. Matthews*, 2 Ves. Sen. 635; and *Grave v. Lord Salisbury*, 1 Bro. C. C. 425.

(b) See the cases last referred to.

(c) 1 Ves. Sen. 520.

(d) 1 Cox's Cases, 188, and Pre. Ch. 240, in a note: *et vide* 2 Ves. Sen. 37, and 15 Ves. 513.

the survivor, and there should be no issue, his heirs, &c., should within nine months after his death pay to her 800*l.* for her own use; but if there were any child or children of the marriage, then that the interest should be paid to her for life, and the principal after her death to or among such child or children, &c. Subsequently to this, the husband by will, after bequeathing several specific articles to his wife, directed that all the debts owing to the business which he then carried on should be collected with all possible despatch; that the household goods and stock in trade should be valued, and the money which should be in the public funds, and the produce of all being collected, the whole should be divided into two equal shares; the one to be the property of his wife, the other of his brother. One question was, whether the bequests to the widow were a satisfaction of the testator's covenant? And his Honour decided in the negative, concluding his judgment upon that part of the case thus; "Upon the principle, therefore, of *Lords Somers and Hardwicke*, that the residue shall not be taken in satisfaction, I am of opinion that the covenant in the marriage articles is not satisfied by the provision of the will."

15. The reader must be apprised that Lord Eldon ascribes the decision in this case to the covenant being entire, so that as the bequest of the residue could not be a satisfaction of the whole covenant, it should not be so of a part of it (*a*); yet it cannot avoid observation that Lord Kenyon expressed the foundation of his decree to be that a residuary bequest was not to be considered a satisfaction of the husband's covenant to pay to the legatee an ascertained sum; and upon the principle before stated.

16. In a subsequent case of *Bengough v. Walker* (*b*), Sir William Grant appears to have distinguished between a debt and a portion, and he intimated that a residuary bequest might probably be considered a satisfaction of the latter, if of

(*a*) See *Garthshore v. Chalie*, 10 Ves. 15.

(*b*) 15 Ves. 513.

larger or equal amount; and he alluded to the decision of Lord Thurlow, in *Rickman v. Morgan*. (a) But *Rickman v. Morgan*, as Mr. Roper observes (b), was not decided upon any general rule applying to the doctrine of satisfaction, but upon the proviso in the settlement, "that all subsequent advancements by the father should be deducted out of the portions, unless otherwise declared by him in writing." The father afterwards bequeathed 4000*l.* to his wife for life, and after her death to B, his third son; and he gave to B (who was intitled to 8000*l.*, the provision in the settlement), the residue of his personal estate, which amounted to more than the portion of 8000*l.* The determination was, that the bequest should go in satisfaction of B's portion under the settlement. Mr. Roper further observes upon that case, "that the father had restrained himself to certain terms in regard to the disposition of his property amongst his children subsequently to the date of his marriage settlement, viz. that all future provisions which he should make for any of them should be deducted out of their portions provided by the settlement, without a written declaration by him to the contrary. The father, therefore, having bequeathed to his son the residue of his personal estate, without making any declaration in writing that it should go in satisfaction of his portion, the Court, upon the face of the settlement, could not avoid decreeing that such residuary bequest should go in satisfaction of the son's portion under that instrument; and in doing so, Lord Thurlow did not, nor did he intend to infringe upon any rule established upon the subject in prior cases."

17. However, in the above case of *Rickman v. Morgan*, Lord Thurlow expressed a strong opinion of the absurdity of holding that a gift of the whole residue should not be a satisfaction when the gift of a legacy of smaller amount would be.

(a) 1 Bro. C. C. 63, continued 2 (b) 2 Rep. H. & W. 60.
Bro. C. C. 394.

18. In a late case (*a*), where a father on the marriage of his daughter had given a bond to secure the transfer of a sum of stock as a portion for her, and had afterwards bequeathed a moiety of the residue of his personal estate to her, it was held that if the moiety of the residue was found to exceed the value of the stock, and there was nothing inconsistent in the respective limitations of the stocks and residue, the gift of the residue was a satisfaction of the portion. Lord Langdale, M.R., remarked that it seemed to be settled that a gift of a residue, being of uncertain amount, should not, without more, be taken in satisfaction of a specific sum of money owing by the testator to an ordinary creditor. But that portions provided and secured by husbands for their wives were subject to other considerations.

19. It seems, therefore, that at the present day a bequest of the whole or of part of a residue to the widow will be considered a satisfaction of her husband's covenant or obligation to pay to, or to leave to her, a certain portion of his personal estate, if it should prove that the bequest exceeds the value of the portion.

20. Where, as in *Devese v. Pontet* (*b*), and *Barret v. Beckford* (*c*), a residue is given between two persons equally, different considerations may be applied: there appears to be an intention of equal bounty towards each, but if the share of one be taken in satisfaction of a prior debt, he derives less benefit from the bequest.

21. When part of the residue is bequeathed in such a form as to afford no uncertainty in regard to the amount of the proportion of it intended to be given, there seems no doubt that it will be a satisfaction of the covenant. If, then, the husband's covenant be to leave, or that his executors shall pay to his widow 2000*l.*, and he devise to her so much of his residuary personal estate as shall be of the value of 2000*l.*, since the amount of the legacy is as certain as the

(*a*) *Earl of Glengall v. Barnard*,
1 Keen, 769.

(*b*) Cited *antè*, p. 185.

(*c*) 1 Ves. Sen. 519.

sum secured by the covenant, it would seem that the bequest of the 2000*l.* would be a satisfaction of the covenant to pay to the legatee the sum of 2000*l.* (a)

22. And probably it would make no difference if the value of the bequest appeared to exceed the sum stipulated to be left or paid, although it were made subject to a charge, for if the Court were able to perceive that after allowing for such charge there remained a surplus of the sum bequeathed greater than or equal to the husband's obligation or covenant, why in that case the bequest should not be considered a satisfaction of the covenant no solid reason appears. "If," said the Master of the Rolls, in *Bengough v. Walker* (b), "I see that the bequest is so large, so far exceeding the portion that the diminution of the burthen imposed upon it cannot affect the relative proportion, it would be against common sense to say, that if a bequest of ten times the amount of the portion is burthened with a charge not to the extent of a tenth part, the remainder, though greatly exceeding the portion, shall not be a satisfaction."

23. The presumption once raised upon the husband's will, that a devise was intended by him in satisfaction of his covenant, may, like other presumptions, be repelled by parol evidence (c); but it is conceived that such testimony is inadmissible to raise the presumption, by showing that he meant to satisfy his covenant, when no such intention appears, or can be legally inferred from his will. (d)

(a) See 15 Ves. 514.

(b) 15 Ves. 515.

(c) See *Jeacock v. Falkener*, 1 Bro. C. C. 295; *Pole v. Lord Somers*, 6 Ves. 319; *Druce v. Denison*, *ibid.*

385. 397: *Garthshore v. Chalie*, 10 Ves. 10.

(d) *Sowden v. Sowden*, 1 Bro. C. C. 583: also see *suprà*, vol. I. p. 442.

CHAPTER VII

Wife's covenant. That property includes. R. & B. 210.

OF THE HUSBAND'S COVENANT TO SETTLE HIS WIFE'S AFTER-ACQUIRED PROPERTY.

R. & B. 267

2. *James v. Durant.*
3. *Blythe v. Granville.*
4. *Hoare v. Hornby.*
5. *Grafftey v. Humpage.*

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7. *Property to wife's separate use not within covenant.*
 8. *May be subject to wife's covenant.*
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Wife's covenant. That property includes. R. & B. 210.

1. THE effect of the husband's covenant to settle the after-acquired property of the wife has been the subject of some late cases.

2. In *James v. Durant* (a), the husband and wife covenanted to settle all property which the wife or the husband in her right should at any time or times thereafter become possessed of or intitled to. At the time of the settlement the wife was intitled to stock, and to some shares in the South London Waterworks. The stock only was settled, the husband contended that the covenant was to extend only to after-acquired property, and that the shares were therefore not subject to the covenant. But it was held that as by virtue of the marriage the husband acquired a title to the shares, they come precisely within the words, and were subject to the covenant.

3. So, in *Blythe v. Granville* (b), where the husband covenanted to settle all the property to which the wife should during coverture become intitled, it was held that a sum of stock in which the wife had an interest in reversion at the time of the marriage was subject to the covenant, Sir L. Shadwell, V. C. E., saying the coverture was the futurity

(a) 2 Beav. 177.

(b) 13 Sim. 190.

referred to, and immediately on the marriage the wife became intitled to the property during the coverture.

4. But in the case of *Hoare v. Hornby* (a), where there was an agreement in a settlement that "all such further or other portion or personal estate, if any, as should, during the life of the wife, become vested in, or accrue to her, or as should or might be assignable by the husband and wife, or either of them, in law or equity, either for a vested or contingent interest," should be assigned upon the trusts of the settlement, it was held that the parties contemplated only what was to be assignable by them at a future time, and that certain property which was at the time vested in the wife was not subject to the trusts of the settlement.

5. In *Graffey v. Humpage* (b), the husband covenanted to settle all property to which his intended wife, or he in her right, should at any time or times thereafter during the coverture succeed to the possession of, or acquire. At the time of the marriage a sum of money which was not mentioned in the settlement stood settled in trust for the wife for life, with remainder to her children, with remainder as she should appoint; and in default, to her executors, administrators, and assigns. The husband having survived the wife, and there having been no children, and the wife having made no appointment, it was contended on behalf of his representatives that nothing was acquired by the husband till the coverture was determined, and that the covenant fixing the period of coverture as the time during which the property to be settled should be acquired, the property in question was excluded. But it was held that as it was by the coverture only that the husband acquired the marital character which afterwards intitled him to administer and possess his wife's estate, the right existed during coverture, and the property was therefore subject to the covenant.

6. But where it was agreed that whatever personal estate

(a) 2 Y. & C. C. C. 121.

(b) 1 Beav. 46.

should, after the solemnization of the marriage, accrue to the wife, or to the husband in her right, should be settled, the wife having survived the husband, the agreement was held to apply to such property only as the wife had become intitled to during the coverture. (a)

re 612 267.

7. Where the husband alone has covenanted to settle property which his wife, or he in her right, may acquire, property to which the wife becomes intitled for her separate use is not subject to the covenant. (b)

8. But where both the wife and husband separately covenanted to settle all real and personal estate (other than certain specified property) as the wife then was seised of, or intitled to, or as she, or her husband in her right, might during the intended coverture become seised of or intitled to, it was held that a reversionary interest in stock to which the wife was intitled at the time of the settlement for her separate use was subject to the covenant. (c)

(a) *Howell v. Howell*, *Howell v. Ex. 264: Thornton v. Bright*, 6 *Law James*, 4 *Law J. N. S. Chan.* 242. *J. N. S. Chan.* 121.

(b) *Travers v. Travers*, 2 *Beav.* 179: *Douglas v. Congreve*, 1 *Keen*, 423: *Drury v. Scott*, 4 *Y. & C. Eq.* 563. (c) *Tawney v. Ward*, 1 *Beav.* 563.

CHAPTER VIII.

OF THE CONSTRUCTION OF LIMITATIONS TO THE "NEXT OF KIN," "PERSONAL REPRESENTATIVES," "EXECUTORS OR ADMINISTRATORS," ETC., OF THE HUSBAND OR WIFE.

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| <ol style="list-style-type: none"> 1. <i>Husband not intitled under limitation to wife's "next of kin."</i> 2. <i>Or to wife's "next of kin or personal representatives."</i> 3. <i>Wife not intitled under limitation to husband's "next of kin."</i> 6. <i>Or to his "next of kin according to statute of distribution."</i> 7. <i>Husband not intitled under gift to wife's "relations."</i> 8. <i>Nor wife under gift to husband's "relations."</i> 11. <i>Wife may take under gift to "persons intitled under statute of distribution."</i> | <hr style="width: 100px; margin: 0 auto;"/> | <ol style="list-style-type: none"> 12. } <i>Effect of limitations to "representatives," "legal personal representatives," "legal representatives," or "personal representatives."</i> 18. } 19. <i>Mr. Roper's remarks on Bailey v. Wright.</i> 20. } <i>Effect of limitations to "executors or administrators."</i> 25. } 26. <i>Effect of limitation to "family" of husband or wife.</i> 28. <i>Husband not intitled under limitation to "right heirs of wife."</i> |
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1. It is settled that the husband has no claim to his wife's property under a limitation to her "next of kin," on the ground that such expressions are to be regulated by the statute of distribution (a), in which the word "kindred" means only persons related to the intestate by blood, which the husband is not. This point was so decided by Lord Rosslyn in *Watt v. Watt*. (b)

2. The same construction was given by Sir W. Grant, M. R., in *Bailey v. Wright* (c), to a limitation to the wife's "next of kin, or personal representatives."

(a) 22 & 23 Car. 2. c. 10.

(b) 3 Ves. 244. But where the wife was illegitimate, and died without issue, it was held that, as there were no next of kin, the fund re-

sulted to the wife, and went to her husband as her personal representative, *Hawkins v. Hawkins*, 7 Sim. 173.

(c) 18 Ves. 49; 1 Wils. 15.

There, by the marriage settlement of Samuel Bailey and M. Orrell, a sum of 700*l.* (the wife's fortune) was settled in trust to place 500*l.*, part of that sum, at interest, and to pay such interest to M. Orrell for her separate use during the joint lives of her and her husband; and if she survived him, the trustees were to pay to her the 500*l.*; but if she died before him, then to pay it as she should have appointed; and in the event of no appointment, in trust "for the next of kin or personal representatives of the said M. Orrell." The trusts declared of the 200*l.*, remainder of the 700*l.*, were to lend it at interest to the husband upon his bond during his life; which interest he was to retain or be paid, and the capital was to be paid to his wife if she survived him, but if he were the survivor, then according to his wife's appointment; and if she made none, then in trust "for the next of kin or personal representatives of the said M. Orrell." No property of the husband was included in the settlement. The wife died without issue, and without having made any appointment, and her husband claimed the funds against her sister under the above ultimate limitations. But Sir William Grant decided against the husband's claim, upon the intention appearing on the settlement. His Honour said, "Had it been meant that the husband should take by surviving his wife, the expression was quite obvious, that, in that event, and in default of appointment, the whole of the two sums should be paid to the said S. Bailey for his own use; that both husband and wife are mentioned by their names wherever they are spoken of in the settlement; but that they had a view to uncertain persons who could be designated only by some general description; that it seemed hardly conceivable that in a marriage settlement a limitation to the wife's 'next of kin' can be introduced except for the purpose of excluding the husband; and that if the intention was to exclude him by the first words 'next of kin,' he could not be let in under the subsequent words 'personal representative;' that whatever the latter words might mean, standing by them-

selves, they could not, as used in this case, take from the first words the sense which they properly had, and were here obviously intended to bear." The husband's bill was dismissed with costs.

On appeal, the decree was confirmed by Lord Eldon (*a*), who remarked, that the nature of the trust of the 200*l.* bore most strongly on the construction, and that the husband could not correspond to the description of next of kin, or personal representative in the settlement, because the benefit which he claimed was one to arise after he had recovered all that was given to him as husband.

3. As the wife does not answer the description of a person related to the husband by blood, she will be in like manner precluded from claiming under a limitation of property to her husband's "next of kin."

4. Thus, in *Nichols v. Savage* (*b*), where the testator bequeathed his residuary personal estate in this manner; "to all and every my next of kin that would have been intitled to my personal estate under the statute made for distribution of intestates' estates, in case I had died intestate:" the Court decided that the widow was not intitled to a share with the testator's next of kin.

5. So, in *Garrick v. Lord Camden* (*c*), where the widow's claim depended upon the construction to be put on the following clause in her husband's will; "and in case after the payment of all the said legacies, bequests, and expenses, there shall remain any surplus money or personal estate, I direct the same to be divided amongst my next of kin, as if I had died intestate," it was contended for the widow, that the Court ought to construe the words "amongst my next of kin, as if I had died intestate," as if the clause had stood thus: "to be divided as if I had died intestate," omitting the words "amongst my next of kin;" but Lord Eldon

(*a*) 1 Swanst. 39.

(*c*) 14 Ves. 376. 381. 386.

(*b*) Cited 18 Ves. 53.

observed, that the whole course of modern authority was against taking that as the first construction of the words; and that, whatever might have fallen from judges, describing the husband as next of kin to his wife, the tenor and bent of modern decisions went to this extent, that if a husband bequeathed to his next of kin, that bequest did not *prima facie* include his wife, and that it was quite clear that if a married woman, under a power by settlement, bequeathed to her next of kin, it would be impossible to hold, that under the construction of such a will, *without more*, the husband would take as sole next of kin. The opinion of his lordship in the present case was thus expressed: "Upon the whole, I think the widow is not one of the next of kin in the ordinary sense, or in the sense in which the testator used the words."

6. In *Cholmondeley v. Ashburton* (a), the ultimate trust in a marriage settlement was for such person or persons as would, at the decease of the husband, be intitled to his personal estates as his next of kin, according to the statutes for distribution of personal estate of persons dying intestate, if the husband had died intestate without having been married to his then intended wife. The husband survived his wife and married again. It was held that his widow was not intitled, Lord Langdale, M. R., observing, that if the words "next of kin" had been omitted, he should have had no doubt that the widow would be intitled; but having been inserted, he must give them full legal effect, and look for the persons whom the law designated by that expression. He found that the widow was not one of the next of kin.

7. The word "relations" being equivalent to next of kin (b), the husband will not be intitled under a limitation to his wife's relations.

(a) 6 Beav. 86: see also *Kilner* Mer. 689: *Smith v. Campbell*, 19 v. Leech, 7 Beav. 202; 16 Law J. Ves. 400: *Bishop v. Cappel*, 11 Jur. N. S. Chan. 503; 11 Jur. 859. 939.

(b) See *Pope v. Whitecombe*, 3

8. For the same reason, the wife will be excluded under a limitation to the relations of her husband.

9. Thus, in *Davies v. Baily* (a), the husband bequeathed to trustees his residuary estate, to pay the interest of it to his wife for life (which raised a strong inference of his intention that his widow was to take no other interest in that fund); and after her death he gave the capital "to such of his relations as would be intitled thereto by the laws in force, of distribution, to be divided as the said laws direct." Lord Hardwicke, after commenting upon the relation between husband and wife to the effect before stated, decreed, under all the circumstances of the case, that the widow was not intitled to any part of the principal of the residuary estate.

10. This case was followed by that of *Worseley v. Johnson* (b), in which the husband, after devising his lands to his wife for life, remainder to A in tail, directed that in default or failure of issue of A, the lands should be sold, and the money divided "amongst his relations, according to the statute for distribution of intestates' estates where no will is made;" and he then gave certain houses in F to his wife in fee. After the death of the wife, and the death and failure of issue of A, the wife's executor filed a bill for the sale of the lands, claiming a moiety of the proceeds under the statute of distribution; but Lord Hardwicke, upon the same principles which governed his decision in *Davies v. Baily*, dismissed the bill.

11. But the widow will take under a gift to the persons intitled under the statute of distribution. Thus, in *Martin v. Glover* (c), where the husband bequeathed his residuary

(a) 1 Ves. Sen. 84.

(b) 3 Atk. 758: see also *Maitland v. Adair*, 3 Ves. 231.

(c) 8 Jur. 640: see *Jenkins v. Gower*, 2 Coll. C. C. 537; 10 Jur. 702. Where the ultimate limitation

of copyholds and leaseholds in a will was "unto or among the person or persons who at the time of the testator's death would be intitled under the statutes for the distribution of the estates of intestates, to his personal

estate "in trust for the person or persons who, under the statute for the distribution of intestates' effects, would be intitled to his personal estate in case he had not disposed of the same by will," it was held that this limitation meant the next of kin according to the statute at his decease, inclusive of his widow, and that they were intitled in the shares pointed out by the statute.

12. The decisions upon the effect of limitations of personal estate to "representatives," "legal personal representatives," "legal representatives," or "personal representatives," have been by no means uniform. (a) It seems, however, now to be settled, that under a limitation simply in such terms, the executor or administrator will take the fund, but as part of the estate of the person whose representative he is. (b)

13. It seems, therefore, that under such a limitation to the wife's "personal representatives," or "legal personal representatives," the husband, whether he administers or not (c), will be intitled, subject to his wife's debts.

14. Upon the above construction of a limitation to "personal representatives," in the late case of *Smith v. Barneby* (d), the widow, who was sole residuary legatee and sole executrix, was held intitled, to the exclusion of the next of kin, under a limitation to the "personal and not the real representatives" of her husband. And upon the same construction, where her husband has died intestate, she will be intitled to her distributive share.

15. In *Saberton v. Skeels* (e), the words "personal representatives" were considered equivalent to executors and

estate in case he should die intestate," it was held that his widow and four children took equally as tenants in common. *Richardson v. Richardson*, 14 Sim. 526; 9 Jur. 322.

(a) See 2 Jar. Wills, 89.

(b) *Holloway v. Clarkson*, 2 Hare, 521; 16 Law J. N. S. Chan. 466: *Smith v. Barneby*, 10 Jur. 748: Ar-

buthnot v. Norton, 10 Jur. 145: *Booth v. Vicars*, 1 Coll. N. C. 6; 13 Law J. N. S. Chan. 197: *Taylor v. Beverley*, 13 Law J. N. S. Chan. 240: *Hinchcliffe v. Westwood*, 17 Law J. N. S. Chan. 167.

(c) See *suprà*, vol. I. p. 41.

(d) *Ubi sup.*

(e) 1 Russ. & M. 587.

administrators, and the substitution of these words vesting an absolute interest in the wife, the husband, as administrator of his wife, was held intitled to the property.

16. In *Robinson v. Smith (a)*, a fund was bequeathed to the husband, his executors, &c., in trust for the separate use of the wife for life, and after her death to pay the trust monies to such persons as she should appoint by will, and in default, to her personal representatives. The wife having died in the husband's life, without having made any appointment, it was held that the next of kin of the wife were intitled, on the ground that the testator intended to give to the husband, his executors and administrators, nothing but a trusteeship.

17. In *Cotton v. Cotton (b)*, under a bequest to a legatee, or his legal representatives, it was held that legal representatives meant those persons who were by law intitled to claim beneficially the undisposed-of residue, and that they were not the executors, or the next or nearest of kin, but the persons intitled beneficially under the statute of distributions, thus including the widow.

18. In *Wilson v. Pilkington (c)*, under an ultimate trust to divide trust monies among the "personal representatives of A in a legal course of administration," it was held that the next of kin of A living at his death were intitled, the expression "personal representatives" being considered to mean consanguinity. Sir J. L. K. Bruce, V. C., said that he wished it to be particularly understood that although he mentioned the word "consanguinity," he did not mean to express any opinion whether the widow of A, if there had been one at his death, would have had any claim on the fund.

19. Mr. Roper, after citing the case of *Bailey v. Wright (d)*, remarks: (e) "It occurs from the attentive consideration

(a) 6 Sim. 47.

(b) 2 Beav. 67.

(c) 16 Law J. N. S. Chan. 169;

11 Jur. 537.

(d) Cited *antè*, p. 193.

(e) 1 Rop. H. & W. 329.

of the above judgment, that cases may happen where the husband may be included under a general disposition by his wife to her 'next of kin' &c., although in a legal sense he does not strictly answer the description. Sir William Grant has said, as before appears, that under these words in a *marriage settlement*, such an interpretation could scarcely be made; the reason is, that from the inference deducible from the circumstance of the husband being a party to it, the intention was that the husband should take no other interest in any event than what is expressly given or reserved to him by the deed. The same inference seems to arise and to be equally applicable, when by the settlement the ultimate limitation of the property is reserved or given to the wife's 'legal personal representatives,' or to her 'personal representatives,' for by these terms the intention must have been that those persons only should have the property who could claim it in their own rights, viz. the wife's next of kin, which restricts the above expressions, as it has been observed, to kindred or relatives of her own blood and family. (a) But this construction or interpretation is not irrefragable; it may be repelled by the intention and effect of the whole instrument. Accordingly, Lord Eldon, in *Garrick v. Camden* (b), a case upon a will, said 'that it was competent, and required from the Court, to look through the whole will; and to see whether, *from the whole*, an intention was manifested to include the wife among those who were to be taken more strictly as next of kin, a description *primâ facie* excluding her;' and his Lordship observed, that upon the following words, 'to be divided as if I had died intestate,' the words 'next of kin' being omitted, might, upon the whole, admit,

(a) See Lord Alvanley's reasoning in *Bridge v. Abbott*, 3 Bro. C. C. 224: also *Jennings v. Gallimore*, 3 Ves. 146: *Long v. Blackall*, 3 Ves. 146. 486: *Lord Cranley v. Hale*, 14 Ves. 307: *Horseman v. Abbey*, 1 Jac. & Walk. 381: *Wellman v. Bowring*, 1 Sim. & Stu. 24; 2 Russ. 374; 3 Sim. 323.

(b) 14 Ves. 382.

or even authorise or require, such a construction as to let in the widow. If so, the same words used in the wife's will made under a power, or similar words in a bequest to her, must also intitle the husband to a share. But it is to be observed that in these cases the widow or husband do not take under the statute of distribution, but as *personæ designatæ* in the will under the intention there manifested: such intention sometimes enlarging the usual acceptation and effect of the words used, so as to let in those persons not strictly answering the description, with those who do so; and at other times restricting the legal import of the expressions, so as to exclude some of the persons who might otherwise have taken under them, as answering the description required by the statute." (a)

20. Limitations to "executors or administrators" have been held in some cases to be equivalent to next of kin (b), but it is now settled that although the words "legal or personal representatives" *may* mean next of kin, the words executors or administrators cannot have that meaning; but that, whether these words are construed as words of limitation or of purchase, the person who answers the description of executor or administrator takes in his representative character, and the fund is to be applied as any other assets that come to him in that character. (c)

(a) Mr. Roper refers to Greenwood v. Greenwood, 1 B. C. C. 32, *in notis*: Wimble v. Pitcher, 12 Ves. 433: and Cotton v. Sharanck, 1 Mad. 45: and his Treatise on Legacies, where most of the cases are collected.

(b) Palin v. Hills, 1 M. & K. 470. In the early case of Evans v. Charles, 1 Anst. 128, which cannot now be considered as an authority, it was held that under such a limitation the executors took for their own benefit.

(c) Daniel v. Dudley, 1 Ph. 1, reversing the decision of Sir L. Shadwell, 11 Sim. 163, and overruling

Bulmer v. Jay, 4 Sim. 48; 3 M. & K. 197. See also Graffley v. Humpage, 1 Beav. 52: Allen v. Thorp, 7 Beav. 72; 13 Law J. N. S. 5: Holloway v. Clarkson, 2 Hare, 524: Attorney-General v. Malkin, 2 Ph. 64; 16 Law J. N. S. Chan. 99; 10 Jur. 955: Smith v. Barneby, 2 Coll. 728; 16 Law J. N. S. Chan. 466; 10 Jur. 748; affirmed on appeal, 11 Jur. 619: Arbuthnot v. Norton, 10 Jur. 145: Price v. Strange, 6 Mad. 159: Stocks v. Dodsley, 1 Keen, 325: Morris v. Howes, 4 Hare, 599; 16 Law J. N. S. Chan. 121; 9 Jur. 966; 2 Eq. R. 299; affirmed on appeal, 10 Jur. 955.

21. The husband, therefore, under a limitation to his wife's executors or administrators, will, subject to the claims of her creditors, be intitled, to the exclusion of the next of kin. (a)

22. And where the husband dies intestate, the wife will on the same grounds be intitled to her distributive share, under a limitation to her husband's executors or administrators.

23. In *Wallis v. Taylor* (b), the husband was held absolutely intitled for his own benefit, under an ultimate limitation "to the wife's executors or administrators for their own use and benefit absolutely."

24. But in *Marshall v. Collett* (c), a widow, who had taken out administration to her husband, was held not to be beneficially intitled, under a limitation in a marriage settlement to the executors or administrators of her husband, for their own use, these latter words being considered as surplusage.

25. In *Smith v. Dudley* (d), the ultimate trust in a settlement of the wife's property was for "the executors or administrators of the wife of her own family;" and the ultimate trust of the husband's property was "for the executors or administrators of his own family," and it was held that the words in respect of the wife's property meant her next of kin at her death, and, with respect to the husband's property, his executors or administrators simply.

26. The husband and wife are in general excluded from a limitation to each other's "family." (e)

27. However, in *M'Leroth v. Bacon* (f), where there was a power to appoint for the benefit of a married woman and her family, it was held, upon the context, that the husband

(a) *Daniel v. Dudley*, cited *suprà*, Bowring, 3 Sim. 328; 1 S. & St. 24; p. 201. 2 Russ. 374.

(b) 8 Sim. 241.

(c) 1 Y. & C. Eq. Ex. 232; S. C. *Meryon v. Collett*, 8 Beav. 386; 9 Jur. 459.

(d) 9 Sim. 125: see *Wellman v.*

(e) See *Brandon v. Brandon*, 3 Swanst. 321; *White v. Briggs*, 15 Sim. 17; S. C. on appeal, 17 Law J. N.S. Chan. 196.

(f) 5 Ves. 159.

was included in the word "family"; Sir R. P. Arden, M. R., admitting the general rule to be to exclude the husband.

28. In *Newenham v. Pittan* (a), it was decided that the husband took no beneficial interest under an ultimate limitation in a settlement to "the right heir or heirs of the wife."

(a) 7 Law J. N. S. 300. As to the subject of this chapter, see Jarman on limitations which have been the sub- Wills, chap. 29.

BOOK THE THIRD.

OF THE WIFE'S SEPARATE ESTATE.

CHAPTER I.

HOW A TRUST FOR THE WIFE'S SEPARATE USE MAY BE
CREATED.

SECTION I.

OF THE VALIDITY OF TRUSTS FOR THE WIFE'S SEPARATE USE.

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| <p>2. <i>What property may be subject to trust for wife's separate use.</i></p> <p>3. <i>Tudor v. Samyne: term of years.</i></p> | <p>4. <i>Trust effectual during future coverture.</i></p> <p>7. <i>Unless where trust confined to particular coverture.</i></p> |
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1. ALTHOUGH the common law does not permit the wife to take or enjoy real or personal estate separate from and independant of her husband, this rule does not prevail in equity, where the capacity of the wife to enjoy property separate from her husband has been long acknowledged.

2. Every kind of property, including estates in fee-simple (*a*) and chattels personal (*b*), may be subject to a trust for the wife's separate use, which will be supported in equity.

3. The case of *Tudor v. Samyne* (*c*) has been cited as an authority that a settlement of a term of years to the wife's

(*a*) *Baggett v. Meux*, 1 Ph. 628.

(*c*) 2 Vern. 270.

(*b*) *Newlands v. Paynter*, 4 M. & C. 408; 10 Sim. 378; 4 Jur. 282.

separate use will not be binding on the husband. But it appears that the term in that case was not settled to the wife's separate use (a), and the validity of such a settlement is now fully established.

4. A trust for the wife's separate use is effectual against the husband, although the wife may be unmarried at the time of the creation of the trust, or being married at that period, may have become discovert, and afterwards married again. *Hastings v. Hastings* 11 L.J. Q. 5

5. This point was decided at common law in the case of *Beale v. Dodd* (b), and afterwards by Sir J. Leach, V. C., and also by Lord Eldon in the case of *Anderson v. Anderson* (c); and it does not appear to have been doubted until some observations which fell from Lord Cottenham, then M.R., in the case of *Massey v. Parker*. (d)

6. But the validity of such trusts is now fully established by the authority of *Tullet v. Armstrong*. (e)

7. Where, however, the trust for the wife's separate use is confined to a particular coverture, it will, of course, be inoperative against a second husband. (f)

8. In a late case (g), where there was a gift to a woman then married "for her whole and sole use during her life, free from the control of any *future* husband," it was held that the gift was effectual as well during the then existing, as a future coverture.

(a) See *suprà*, vol. I. p. 99.

(b) 1 T. R. 193: see *Horseman v. Abbey*, 1 Jac. & W. 381.

(c) 2 M. & K. 427.

(d) 2 M. & K. 174: see also *Maber v. Hobbs*, 2 Y. & C. Eq. Ex. 317.

(e) 4 M. & C. 377; 1 Beav. 1; 2 Jur. 913: see also *Davies v. Thor-*

nycroft, 6 Sim. 420: *Newlands v.*

Paynter, 4 M. & C. 408: *Dixon v. Dixon*, 1 Beav. 40.

(f) *Bradley v. Hughes*, 8 Sim. 149: *Knight v. Knight*, 6 Sim. 121: *Benson v. Benson*, 6 Sim. 126.

(g) *Steedman v. Poole*, 6 Hare, 193; 16 Law J. Chan. 348; 11 Jur. 449. 555.

SECTION II.

WHAT WORDS WILL NOT CREATE A TRUST FOR THE WIFE'S SEPARATE USE.

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| <ol style="list-style-type: none"> 1. <i>Husband not excluded unless intent clear.</i> 2. <i>"Husband to have no part."</i> 3. <i>Annuity to be purchased in name of trustee to be paid to wife.</i> 4. <i>Interest to be paid to wife for life, and capital to such uses as she "whether sole or married" should appoint.</i> 5. <i>To be paid to wife "to her, to and for her use."</i> | <ol style="list-style-type: none"> 6. <i>"Own use and benefit," "own proper use and benefit," "sole control."</i> 7. <i>To be paid into wife's "proper hands for her own use and benefit," "Own absolute use and benefit."</i> 8. <i>To be applied by wife "for maintenance of herself and children."</i> 9. <i>"Not to be charged or assigned."</i> 10. <i>Trust for wife for life, husband being one of trustees.</i> |
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1. It must be observed that Courts of Equity will not deprive the husband of his wife's property, to which he is by law intitled, unless the intention be clear that he is not to derive any benefit from it, and that it shall be for the personal use and disposition of his wife. (a)

2. Thus, in *Brown v. Clark* (b), the testator bequeathed to his sister A (a married woman), and to B, the interest of his residuary estate, in equal shares; upon A's death, half of the principal was to be divided amongst her children, of which the husband was to have no part, but it was to be entirely for the children; and if she had none alive, then the sum was to be equally divided amongst B's children; and after the deaths of B and wife, the other half of the principal was to go in like manner amongst his children. It was contended on the part of A, that as it was expressed that the

(a) See *suprà*, vol. I. p. 137, *et seq.*:
also *Rich v. Cockell*, 9 Ves. 370.
377.

(b) 3 Ves. 166.

husband should have no part whatever, the bequest to the wife was a trust for her separate use; but Lord Alvanley was of opinion that those words were only applicable to the principal money, of which the wife had no share, and not to the interest, to a moiety of which she was intitled for life: the interest therefore being given to her without qualification or restriction, it was subject to the right of her husband.

3. So, also, in *Dakins v. Beresford* (*a*), B devised property to C, in trust to sell, and out of the produce "to purchase, in his own name, an annuity of 80*l.*, for the life of the wife of D, and to pay the same to her and her assigns." D, although living apart from his wife, claimed the annuity; which demand was resisted, upon the ground that it was the intention of the testator that the wife should enjoy the annuity to her separate use, manifested in the direction to C, to purchase it in his own name, in trust for the wife of D; but the Master of the Rolls declared, that as there were no negative words in the will to exclude the husband, he could not deprive him of his legal right to the annuity.

It is observable in this case, that the bequest amounted to no more than to a trust to pay an annuity to the wife for life. Such a bequest, therefore, did not afford that clear intention to exclude the husband from his marital right, as a Court of Equity requires for that purpose; the mere interposition of a trustee never having been held sufficient to manifest any such intent.

4. Again, in *Lumb v. Milnes* (*b*), A bequeathed his residuary personal estate to trustees, in trust to pay half-yearly, a part, or the whole of the interest, upon a certain event, to his niece B (the wife of C) for life, and to apply the capital to such uses, &c. as B, whether sole or married, should appoint, as therein mentioned; and in case of no appointment, then to the use of B's legal representatives, including C, if then living. The question was, whether, under

(*a*) 1 Cha. Ca. 194: see also *Stan-*
ton v. Hall, 2 Russ. & M. 175.

(*b*) 5 Ves. 517.

the above bequest, B was intitled to receive the interest of A's residuary estate separate from and independently of her husband, or whether his assignees (he having become a bankrupt) were intitled to it during her life. And Lord Alvanley was of opinion, that the words of the will were not sufficient to give the annuity to B's separate use, and that therefore the assignees were intitled to it upon making a provision for her. This case appears to be the same in principle with that of *Brown v. Clark*, for there is no qualification nor restriction whatever in the direction as to the payment of the interest to the wife.

5. In the case of *Jacobs v. Amyatt (a)*, the testatrix bequeathed the residue of her estate to or in favour of B, then a minor, and unmarried, to be placed at interest until she attained the age of twenty-one, or married; in either of which events she was to receive the capital, with the accumulations that were directed to be paid to her, to and for her use during her life, with limitations over. She married under age, and claimed the property as bequeathed to her separate use; but the Master of the Rolls, by whom the cause was first heard, decided against her claim in favour of the husband's marital right; and his Honour's decree was afterwards confirmed by the Chancellor upon appeal.

6. Legacies to married women for their "own use and benefit" have been held not to be separate property (*b*), as also have gifts to the wife's "absolute use" (*c*), to her "own proper use and benefit" (*d*), "to be under her sole control." (*e*)

7. The same construction has been given to the words to be paid "into her own proper hands, to and for her own

(a) Stated in a note to *Beresford v. Hobson*, 1 Mad. 376.

(b) *Johnes v. Lockhart*, cited 3 B. C. C. 383, *Belt's ed.*: *Wills v. Sayers*, 4 Madd. 409: *Roberts v. Spicer*, 5 Madd. 491: *Beales v. Spencer*, 2 Y. & C. C. C. 651: *Kensington v. Dolland*, 2 M. & K. 184.

(c) *Ex parte Abbott*, 1 Deac. 338.

(d) *Blacklow v. Lawes*, 2 Hare, 49, where the authorities were considered by V. C. Wigram.

(e) *Massey v. Parker*, 2 M. & K. 174.

use and benefit." (a) And it seems that a bequest to a woman or her assigns during her life "for her and their own absolute use and benefit," is not a gift to her separate use. (b)

8. In *Wardle v. Claxton* (c), where a testator bequeathed his residuary estate to trustees in trust to pay the income to his wife for her life, to be by her applied for the maintenance of herself and such children as he might leave at his death, it was held not to be a gift to the wife's separate use.

9. In the late case of *Gilchrist v. Cator* (d), where a testator gave an annuity to an unmarried niece, to a married niece, and to a nephew, and declared, that as to the annuity to the unmarried niece and the nephew, they should not charge or assign, and if they did so, the annuity should go to his residuary legatee; and as to the annuity to the married niece, it should be for her separate use, independent of any husband, it was held that the annuity to the unmarried niece was not given to her separate use.

10. Where a testator gave a moiety of the residue of his estate to the husband and another person, as trustees, in trust for the wife for her life, the circumstance of the husband being named as one of the trustees was held not to be a sufficient ground for inferring that the testator intended that she should take the life interest in the trust fund to her separate use: it was not necessary to determine what might be the inference if her husband was named as the sole trustee of a fund given to the wife for life. (e)

(a) *Tyler v. Lake*, 4 Sim. 144 ;
S. C. 2 Russ. & M. 183.

(d) 11 Jur. 448.

(b) *Bycroft v. Christie*, 3 Beav. 241.

(e) *Ex parte Beilby*, 1 Glyn & J. 167; *Kensington v. Dollond*, 2 M. & K. 184.

(c) 9 Sim. 524 ; 3 Jur. 145.

SECTION III

WHAT WORDS WILL CREATE A TRUST FOR THE WIFE'S
SEPARATE USE.

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| 1. "Sole and separate use," "sole use."
2. "Own use &c.," "free from power of husband."
4. Any words sufficient where intent appears.
5. "To enjoy and receive."
6. For the "livelihood" of the wife.
7. "Wife's receipt to be a sufficient discharge." | 8. "To be paid into her proper hands."
9. Securities to be given to her "on demand."
10. For wife's "support and maintenance."
11. Legacy "in addition" to former gift to separate use.
12. Wife absolutely intitled to capital where dividends to be paid to separate use. |
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1. THE following words have been held to create a trust for the wife's separate use: "sole and separate use" (a), "sole use, benefit, and disposition." (b)

2. So have the words "for her own use, and at her own disposal" (c), "own sole use" (d), "sole use and benefit" (e), "free from the power of her husband." (f)

3. And where there was a bequest of a fund to a married and unmarried woman; "to be equally divided between them, share and share alike, for their own use and benefit, independent of any other person," it has been held to be a gift for their separate use. (g)

(a) *Parker v. Brooke*, 9 Ves. 583.

(b) *Ex parte Ray*, 1 Madd. 199.

(c) *Prichard v. Ames*, 1 Turn. & Russ. 222: see also *Inglefield v. Coghlan*, 2 Coll. 247.

(d) *Ex parte Killick*, 3 Mont. D. & D. 480; 13 Law J. N. S. Bank. 6; 8 Jur. 67. As to the meaning of

the word "sole" when applied to a married woman, see *Berchtoldt v. M. Hertford*, 8 Jur. 50.

(e) — *v. Lyne*, *Younge Eq. Ex.* 562.

(f) *Ogle v. Corthorn*, 9 Jur. 325.

(g) *Margetts v. Barringer*, 7 Sim. 482.

4. Indeed, no particular form of words is necessary to raise a trust for the separate use. (a) Whenever it appears, either from the nature of the transaction, as in the instance of a settlement in the contemplation of marriage, where the husband is a party, or from the whole context of the instrument limiting to the wife the property, that she was intended to have it to her sole use, that intention will be carried into effect by a Court of Equity.

5. Thus, in *Tyrrell v. Hope* (b), (the case of a settlement before marriage), when the deed was read over to the wife, and before its execution she observed that there was a mistake, for that the moiety of certain premises limited to her mother for life, was after her death limited to the husband for life, and not to her own separate use, as had been agreed upon; she therefore having refused to execute the settlement unless the mistake was rectified, the husband signed a note, by which he agreed with his intended wife, that "she should enjoy and receive the issue and profits of a moiety of the estate then in the possession of her mother, after the mother's death." This note was satisfactory, and then the wife executed the settlement. The husband having become a bankrupt, the Master of the Rolls decided against the claims of the husband's assignees to his property, holding that it was a trust in the husband to the wife's separate use. His Honour observed, that the words in the note could admit of no other construction than that the property should be for the wife's separate use; and asked, to what end she should receive the profits, if they were to be the husband's property the next moment. He added, that the word "enjoy" was very strong to imply a separate use to the wife.

6. So also in *Darley v. Darley* (c), Lord Hardwicke is reported to have said that technical words were not necessary to create a separate trust for the wife, and that the word "livelihood" was sufficient to show the intention of the

(a) *Stanton v. Hall*, 2 Russ. & M. 180.

(b) 2 Atk. 558.

(c) 3 Atk. 399.

donor that the property should be to her sole and separate use. According to this opinion, if a devise were made to the husband, or a trustee for the wife's livelihood, the property would not belong to the husband, but to his wife as a feme sole.

7. Again, in *Lee v. Prieaux* (a), the testatrix bequeathed to Ann Hill, widow, for life, an annuity of 10*l.*, out of certain stock which she vested in a trustee; and she directed the surplus dividends to be paid to Sophia Lee, a married woman; she also ordered the whole dividends to be paid to Sophia after the annuitant's death, during Sophia's life: and she declared that her trustee "should not be troubled to see to the application of any sum or sums paid to the said Ann Hill and Sophia Lee, but that their receipts in writing should be sufficient discharges to her said trustee," &c. Lord Alvanley was of opinion, that although the words "notwithstanding the coverture of Sophia Lee" were omitted, and no notice of her then marriage was taken, yet that the other expressions in the clause were sufficient to intitle the wife to the dividends as her separate property. His Honour observed, that two women were the objects of the testatrix's bounty; the one a widow, and the other a married woman. With respect to the former, the testatrix might have used these words as a caution against any future husband having a right to the money; they must have their meaning, and that probably the testatrix might have inserted the words, "her receipt shall be a sufficient discharge," in consideration of Sophia being a married woman, who was in that situation which otherwise prevented her giving such an acquittance; and that if these words had no meaning, the testatrix might as well have omitted them. His Honour was therefore of opinion, that there was a clear intent to be collected from the words of the clause, that the testatrix meant that Sophia, though a married woman, should have the power to give a discharge, so as to bar her husband.

8. In *Hartley v. Hurle* (b), the testator gave the annual

(a) 3 Bro. C. C. 382.

(b) 5 Ves. Jun. 540.

produce of the trust fund created by his will, subject to debts, legacies, and annuities, &c., in trust for his daughter Ann Hurle, as therein mentioned, to be paid by his trustees into her proper hands; and Lord Alvanley said, he conceived that this was to her sole and separate use. (a)

9. So, in *Dixon v. Olmius* (b), the bequest was of a bond and mortgage debts to the testator's niece B, a married woman, with a direction that they should be delivered up to her whenever she should demand or require the same. The question was, whether these securities were to be considered as given to B for her separate use. And the Chancellor said, that as these securities were to be given up to B on her demand, her husband could not have obtained them from the executors without a demand made by B, which gave her the dominion over them; they must therefore be considered as given to her separate use.

10. In *Cope v. Cope* (c), where a legacy had been given to trustees for the support and maintenance of the wife of A, and for the support and education of his children, and there were no children of A at the testator's death, it was held that the wife took the legacy absolutely for her separate use.

11. In a late case (d), where a legacy having been given to the wife for her separate use, a further annuity was by a codicil given to her "in addition," it was held that it was also given to her separate use.

12. It may be here observed that a gift of stock to trustees in trust to pay the dividends to a married woman for her separate use, not limited to her life or any other period, gives her an absolute right to the capital. (e)

(a) See 18 Ves. Jun. 434.

(b) 2 Cox's Rep. 414.

(c) 2 Y. & C. Eq. Ex. 543.

(d) *Day v. Croft*, 4 Beav. 561: and see *Vesey v. Vesey*, 12 Jur. 548.

(e) *Elton v. Shepherd*, 1 B. C. C. 532; *Haig v. Swiney*, 1 S. & St.

487: *Adamson v. Armitage*, Coop.

283; 19 Ves. 416. As to the construction of gifts to the wife "to be settled upon her," see *Young v. Macintosh*, 13 Sim. 445; 7 Jur. 382:

Laing v. Laing, 10 Sim. 315.

SECTION IV.

OF TRUSTS FOR THE WIFE'S SEPARATE USE, WHERE TRUSTEES
HAVE NOT BEEN INTERPOSED.

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| <hr style="width: 100%;"/> 1. <i>Where no trustee, husband trustee for wife.</i>
4. <i>Trustees for person under whom wife claimed held to be trustees for her.</i>
5. <i>Husband à fortiori trustee where property vested in him for wife's separate use.</i>
6. <i>Wife's equity enforced against purchaser from husband with notice of trust.</i> | <hr style="width: 100%;"/> 7. <i>Effect of husband's agreement before marriage that wife shall have property for separate use.</i>
8. <i>To what property such agreement as to wife's property in general terms applies.</i>
9. <i>Where devise in trust for wife's separate use, legal estate will remain in trustee.</i>
10. <i>Secus, where limitation in deed.</i> <hr style="width: 100%;"/> |
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1. THE interposition of trustees seems to have been at first considered necessary in order to protect the wife's separate interest (a); but it has been established ever since the year 1725, that if land or personalty be devised or settled to or upon a married woman for her separate use, without the precaution of vesting it in trustees, still, in equity, the intention will be effectuated, and the wife's interests protected by the conversion of her husband into a trustee for her.

2. Thus, in *Bennet v. Davis* (b), A devised his real estates to his daughter B, the wife of C, in fee for her separate use, exclusively of her husband; and he declared that C should not be tenant by the curtesy, nor have the lands for his life if he survived B; but that on B's death they should descend to B's heirs. The defendant Davis was assignee under a commission of bankruptcy which had issued against

(a) *Harvey v. Harvey*, 1 P. W. 125; *Burton v. Pierpoint*, 2 P. W. 79.
(b) 2 P. W. 316; *Douglas v. Congreve*, 1 Beav. 72.

C; and upon the wife's bill to compel an assignment of the lands to her separate use, it was resisted by Davis, upon the ground that the estate not having been conveyed to trustees for the wife's separate use, the husband's legal right to the profits attached, notwithstanding the contrary intention apparent upon the will, and that therefore he, Davis, as the husband's assignee, was intitled to them; but the Master of the Rolls decreed in favour of the wife, declaring that the husband took as a trustee for her, and that there was no difference where the trust was created by the act of the party, and where by the act of the law; also that the assignee, claiming under the husband, took the property, subject to the same trust.

3. So, in *Parkèr v. Brooke* (a), the testator bequeathed to the separate use of his daughter (a married woman) for life, remainder to her children, leasehold estates after the death of her mother; and although no trustees were interposed, the husband was considered a trustee for his wife. And in *Rich v. Cockell* (b), Lord Eldon said, that it was perfectly settled that a husband might in a Court of Equity be a trustee for the separate use of his wife.

4. A Court of Law has even extended its protection to the wife against the husband, when no trustees were appointed in the deed by which her title to separate property was created, holding that persons named in a will as trustees for the person from whom she claimed, were also to be considered trustees for her.

Thus, in *Davidson v. Atkinson* (c), the testator devised some lands in which collieries had since been discovered, to three persons, in trust to sell for the benefit of others, of whom B (afterwards the wife of A) was one; and until sale, the trustees were to receive the rents, and to pay a part of them to B, for her sole and separate use. The lands

(a) 9 Ves. 583: see also *Newlands v. Paynter*, 4 M. & C. 408; 10 Sim. 378; 4 Jur. 282.

(b) *Ibid.* 375.

(c) 5 Term Rep. 434.

were not sold, and the trustees let the collieries. Before B's marriage, she conveyed one-eighth part of the profits of the collieries to C, the plaintiff's wife (*not to a trustee for her*), to her sole and separate use. The trustees in the will having no notice of the conveyance to C, paid to B her share of the rent under the will. C's husband brought an action of *assumpsit* against the husband of B, to recover one-eighth part of the rent, upon the ground that, as no trustee was appointed for the plaintiff's wife in the conveyance made to her, it was in law a conveyance to the husband, who alone had a right to sue for the money; but the Court held that the trustees under the will, in whom the legal estate was vested, were to be considered as trustees for C, the plaintiff's wife, and that the husband was not intitled to recover in the action; Lord Kenyon observing, that the interests of the plaintiff and his wife were in direct opposition to each other, and that if the Court permitted him to recover the money which was intended for her separate use, her separate right would be destroyed.

5. The above are cases where the property was given by strangers to the wife's separate use; but the principle equally applies, and even more strongly, when the estate is given to the husband for her separate use. (a) In these instances he will be a trustee for his wife of such property, and the wife's equity to it will be enforced against assignees in bankruptcy, and under the insolvent debtors acts, and against trustees under a conveyance from the husband to pay debts. (b)

6. In the case of *Parker v. Brooke* (c), the wife's equity was enforced against a purchaser from her husband with notice of the trust. In that case, the husband in the year 1791 mortgaged leasehold estates which had been bequeathed to his wife's separate use for life, remainder to

(a) 3 Atk. 399; 9 Ves. 369.

Newlands v. Paynter, 4 M. & C.

(b) See the cases of *ex parte* 408; 10 Sim. 378; 4 Jur. 282.
Wells, 2 Mont. D. & D. 504: and

(c) 9 Ves. 583.

her children, without the intervention of a trustee; and he obtained reversionary leases of the premises for ninety-nine years, determinable on a life. He also in 1792 made another mortgage of all the premises, which securities it was in 1794 agreed should be assigned to the defendant Brooke, but which agreement was not carried into effect. In 1800 Brooke obtained possession of the lands, in an ejectment brought by him against the husband, upon the latter's confession of the action. The husband then died, and after that event the wife and her child filed a bill against Brooke and the mortgagees, charging them with notice of the will, and that Brooke obtained possession of the premises in collusion with the husband, &c. ; and they prayed an assignment of the original terms to trustees for them, upon the trusts for the will, cancellation of the mortgages, delivery up of the reversionary leases, possession of the premises, and an account of profits on payment of the fines. Brooke insisted upon his agreement, as being for a valuable consideration. The mortgagees stated (in answer to a charge in the bill), that the mortgage monies were paid when the securities were obtained. It was in evidence that the reversionary leases were beneficial, and were granted to the husband upon his representations that he was intitled to the privilege of those reversionary leases under the will of the former tenant. Sir William Grant, M. R. decided that there was no distinction between the mortgage of the original and of the reversionary leases, that the trust in both cases referred to the same circumstances, and that there was equally notice in both. His Honour observed, that the whole originated in mistake of the law, and the effect of the omission of trustees; that there was complete notice, for those who drew the deed introduced the history of the transaction, as laying the foundation for the husband's right to the renewed lease. The decree was in favour of the wife and child, and an account directed, in conformity with the prayer of the bill.

7. So, where the husband, before marriage, agrees by writing

that his wife shall be intitled to specific parts of real or personal estate for her separate use, but, in consequence of the property not having been so actually settled, the legal title to it becomes vested in him by the subsequent marriage, in all such cases the husband will be a trustee of the funds for her separate use. (a)

8. If the agreement merely gives to the wife disposing power over her property in general terms, it will be construed to apply only to what she has at the time, and not to subsequent acquisitions. (b)

(a) If the agreement is not in writing, the non-reduction of it into writing must be owing to the fraudulent conduct of the husband, otherwise the statute of frauds will interpose between the wife's equity and the liability of the husband to perform his promise. See *antè*, p. 113, where this subject is discussed. Where, however, a settlement is actually made before marriage, and it appeared to have been intended to secure the wife's property for her separate use, but the deed as framed is defective in that particular, a court of equity will rectify the mistake from the internal evidence in the instrument. See *antè*, p. 150. And where a plain mistake has been made in preparing the instrument, parol evidence is admissible, though received with great caution. See the cases collected in 1 Sug. V. & P. p. 258, 10th ed., *et seq.*: *Barstow v. Kilvington*, 5 Ves. 593: *Beaumont v. Beamley*, 1 Turn. & Russ. 41: *Ball v. Storie*, 1 S. & W. 210: *Pearce v. Verbeke*, 2 Barn. 336: *Harbidge v. Wogan*, 5 Hare, 258; 15 Law J. N. S. Chan. 281; 10 Jur. 703: *Duke of Bedford v. M. of Abercorn*, *Breadalbane v. Chandos*, 2 M. & C. 711. How-

ever, if an error be discovered in the deed prior to its execution, and a party to it refuse for that reason to sign it until a memorandum in writing, corrective of the mistake, be prepared and signed by a party or parties to the settlement, in that case the deed will be altered or controlled by the subsequent instrument, in that particular, as it was admitted in *Tyrrell v. Hope*, 2 Atk. 558—560, stated *antè*, p. 211; because both instruments were executed at the same time, and are to be considered and construed as one deed. When a settlement is made after marriage, in pursuance of articles entered into before its celebration, and the deed is required for the above reason to be rectified, a court of equity will not comply with the request without a production of such articles, or other competent evidence of their contents, if the original be lost, *Cordwell v. Mackrill*, Anab. 517. What will and will not be a good settlement by the husband to the separate use of his wife, against his creditors, or a purchaser, the reader will find treated of in the preceding book.

(b) *Pilkington v. Cuthbertson*, 1 Bro. P. C. 337.

9. Where there is a devise to trustees for the wife's separate use in terms which would execute the use in the wife, the Courts will hold the legal estate to be vested in the trustees, in order to effectuate the testator's intention by excluding the control of the husband. (a)

10. But a deed will not be thus construed. (b)

(a) *Neville v. Saunders*, 1 Vern. 415; *Jones v. Ld. Say & Seal*, 1 Eq. Ab. 383; *Harton v. Harton*, 7 T. R. 652; *Hawkins v. Luscombe*, 2 Swanst. 391.

(b) *Williams v. Waters*, 13 Mees. & Wel. 166.

CHAPTER II.

OF THE WIFE'S POWER OF DISPOSITION OVER HER SEPARATE ESTATE.

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| 1. <i>May dispose of personal estate as feme sole.</i>
3. <i>Fettiplace v. Gorges.</i>
5. <i>Although reversionary.</i>
7. <i>Whistler v. Newman.</i>
8. <i>Mr. Roper's remarks thereon.</i>
9. <i>May dispose as feme sole of rents and profits of real estate.</i>
10. <i>But not of estate in fee where no power to appoint.</i>
11. <i>Will of such estate void.</i>
12. <i>May dispose of savings of separate estate.</i> | 14. <i>Cannot devise produce of separate estate if invested in land.</i>
15. <i>Wearing apparel bought with produce of separate estate.</i>
16. <i>Arrears of separate estate due at time of second marriage.</i>
17. <i>Wife's grants out of, or incumbrances on, separate estate valid.</i>
20. <i>Mores v. Huish.</i>
21. <i>Mr. Roper's observations thereon.</i> |
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1. WITH respect to personal estate, it has been settled since the case of *Fettiplace v. Gorges* (*a*), that when personal property is actually given or settled, or is agreed to be given or settled, to the separate use of a married woman, she may dispose of it as a feme sole to the full extent of her interest.

2. In *Peacock v. Monk* (*b*), Lord Hardwicke said, "that where there is an agreement between husband and wife before marriage, that she shall have to her separate use either the whole or particular parts of her personal property, she may dispose of it by acts in her lifetime or by her will." But this observation applied to marriage contracts only to which the husband was a party; the general principle applicable to all cases was that upon which the decision of

(*a*) 1 Ves. Jun. 46; 3 Bro. C. C. 8.

(*b*) 2 Ves. Sen. 191.

Fettiplace v. Gorges was founded, namely, that when once the wife is permitted to take personal property to her separate use as a feme sole, she must so take it with all its privileges and incidents, one of which is the *jus disponendi*.

3. Fettiplace v. Gorges was to the following effect. The husband being embarrassed and obliged to go abroad, conveyed all his estates in trust to pay his debts, and an annuity of 200*l.* to the separate use of his wife, and not to be subject to his debts or control. She was also intitled to 1000*l.* stock under the will of A, bequeathed in trust for her sole and separate use. After the wife's death, a writing signed by her was found, by which she left all her personal estate and every thing belonging to her to B. The husband, being the survivor, claimed two sums of 1000*l.* and 1900*l.* stock, which were found at her death in the names of trustees for her sole and separate use. But Lord Thurlow dismissed the bill upon the principle before stated.

4. That case was followed by Rich v. Cockell. (a) There 500*l.*, three per cent. consols, were, by the will of A, vested in trustees, in "trust to pay, transfer, and dispose of the same, and every part of the fund, and also of the dividends, &c., for the sole and separate use and benefit of her daughter B, the wife of C, as she should direct or appoint," with a direction that B's receipt should, notwithstanding the marriage, be a good discharge to the trustees, in the payment or disposal thereof according to her free will and pleasure. The husband obtained a transfer of the stock. B, his wife, made a will disposing of 400*l.*, part of the stock, for a transfer of which the suit was instituted by the legatee against the husband; and Lord Eldon decreed accordingly, observing that the first will only expressed a trust for the wife's separate use, not determining as to the power of disposition, whether by deed, or will, or other writing, but that

(a) 9 Ves. 369: see also Wagchall v. Burchall, 3 Add. Ecol. R. staff v. Smith, 9 Ves. 520: and Bur- 263.

the nature of her interest was settled, viz. that the trust being for her separate use, she was enabled to dispose of it by will as an incident to such interest, or she might have a power to dispose by an instrument not amounting to a will supported in that Court as a direction or appointment.

5. And the wife has the same power of disposing of reversionary interests, where settled to her separate use, as of interests in possession.

6. Thus, in *Sturgis v. Corp* (a), money in the funds, in which A had a life interest, was vested in trustees, in trust, after the death of A, to pay the dividends into the proper hands of B, for her sole and separate use for life, whose receipts should be good discharges; and after her death the capital was given to C. D, the husband of B, purchased C's interest, and then B and D sold by auction their reversionary interest, A being still living. The purchaser, before he would complete his contract, required B's consent in Court for the passing of her reversionary estate for life. And Sir William Grant said, that where property was settled to the separate use of a married woman, her examination was unnecessary. That if the principle was, that the wife is, as to that property, a feme sole, and has a disposing power as such, then B had as much a disposing power over her reversionary interest as over her interest in possession. (b)

7. Mr. Roper notices the case of *Whistler v. Newman* (c) as at variance with the authorities which have been just stated.

There, upon the marriage of Mrs. Newman, 1200*l.*, 3½ per cent. Bank annuities (her property), were vested in trustees, in trust to pay the dividends into her hands for life, for her sole and separate use, and which were not to be liable to

(a) 13 Ves. 190.

(c) 4 Ves. 129: see *Mores v.*

(b) See also *Headen v. Rosher*,
M'Clelland & You. 89: and *Major*
v. Lansley, 2 Russ. & M. 355.

Huish, 5 Ves. 692.

her husband's debts, &c. Her receipt too was declared to be a good discharge. The trustees sold the stock at the request of Mr. and Mrs. Newman, and paid to him, with her consent, the proceeds. He afterwards became insolvent, and died. The trustees then replaced the stock; and the question, so far as concerned the widow, was, whether, as the fund had been sold at her instance and request, she did not dispose of the dividends to which she was intitled to her separate use for life in favour of her husband. Lord Rosslyn decided in the negative, and that she was intitled to the dividends which had accrued since her husband's death. His Lordship's reasons were, because this case differed from the others on the subject that it was between the widow and her trustees, and not between her and her separate creditors, and that it was a breach of trust in her trustees to pay, even with her consent, the dividends to the husband.

8. Upon this case Mr. Roper observes (a): "first, that the wife being to be considered a feme sole as to her separate estate, and having the unlimited power of disposition over it, might give it to whom she pleased, including her husband. The dividends, therefore, were in this instance, upon the principle of the case of *Fettiplace v. Gorges*, and the other cases, effectually given by the wife to her husband; and secondly, if she had such unlimited power of disposition, as is clearly established by those cases, and if she might, independently of her trustees, and without their concurrence, have given the dividends to her husband, as is also established by the cases of *Grigby v. Cox* (b), *Pybus v. Smith* (c), and *Essex v. Atkins* (d), their having acted in compliance with her request could not with justice be considered a breach of their trust or duty towards her. It is conceived, therefore, that this case is not now of any authority." (e)

(a) 2 Rop. H. & W. 185.

(b) 1 Ves. Sen. 518.

(c) 1 Ves. Jun. 193.

(d) 14 Ves. 547.

(e) See Lord Eldon's observations upon this case in *Parkes v. White*, 11 Ves. 223.

9. With respect to rents and profits of real estates, a gift of them to, or rather in trust for, the wife for her separate use, enables her to dispose of them as a feme sole. (*a*)

10. But a limitation of real estate to the wife in fee to her sole and separate use, without expressing more, will not enable her to dispose of it during the marriage otherwise than by the modes by which she is allowed to dispose of other real estate, namely, by deed duly executed under the provisions of the late act for the abolition of fines and recoveries (*b*), and formerly by fine or recovery, because no power having been given to her by the instrument to make any disposition of the property, she can only do so by the mode prescribed by the general law; and if she omit to do so, her heir will take the estate.

11. Accordingly, she cannot make a will of such real estate. (*c*)

12. With respect to the general power of the wife to dispose of the savings arising from her separate property, the principle is laid down by the Lord Keeper in the case of *Gore v. Knight* (*d*), to the effect that the wife having a power to dispose of the principal, has necessarily the like power over its produce; for the sprout is to savour of the root, and to go the same way.

13. But when the wife does not dispose of such savings, the quality of separate property ceases at her death, and the husband is intitled to them by his marital right. (*e*)

14. The wife may dispose of the produce of her separate estate by will, if she has such a power over her personal estate, but if it has been laid out in real estate, she cannot devise it. (*f*)

(*a*) *Hulme v. Tenant*, 1 B. C. C. 16.

(*b*) See *suprà*, chap. 24, sec. 2.

(*c*) *Doe d. Stevens v. Scott*, 4 Bing. 505; 1 Moo. & P. 317.

(*d*) 2 Vern. 535: see also 1 Vern. 244: *Gold v. Rutland*, 1 Eq. Ca. Ab. 346, pl. 18: *Fettiplace v. Gorges*,

1 Ves. Jun. 46; 3 B. C. C. 8: and *Cecil v. Juxon*, 1 Atk. 278.

(*e*) *Molony v. Kennedy*, 10 Sim. 255: see also *Tugman v. Hopkins*, 4 Man. & Gr. 389; 5 Scott, N. R. 464.

(*f*) *Churchill v. Dibben*, cited in

15. In a late case (*a*), it was held that wearing apparel which had been bought by the wife out of the produce of property vested in trustees for her separate use, belonged to the husband, and might be taken in execution for his debts; Parke, B., however, doubting whether the wife might not have been held to be the agent of the trustees for the purpose of buying the clothes.

16. Arrears of separate estate, which were due to the wife at the time of a second marriage, have been held to belong to her as separate estate. (*b*)

17. The wife having the power of absolutely disposing of her separate estate, she may consequently make grants out of, or otherwise incur it.

18. Thus, in *Wagstaff v. Smith* (*c*), 750*l.* four per cent. Bank annuities were limited in trust "to permit B to take or receive the dividends to her own use for life, independent of her husband C, or any future husband." The husband and wife, in consideration of a sum of money paid to them by D, assigned the dividends to a trustee during B's life, to secure the grant of an annuity to D, and the grant was established.

19. The case of *Power v. Bailey* (*d*) was to the like effect. There, previously to the marriage of A with her first husband B, it was by articles of settlement agreed that her estates should be vested in trustees for her sole and separate use, and that she should have full power and dominion over them. A, prior to the marriage of C, (for whom she was under promise to provide) settled, with the privity of B, and in execution of her power, an annuity upon C, which C and her husband afterwards mortgaged. Payment of the annuity having been discontinued by the second husband of A,

note to *Curteis v. Kenrick*, 9 Sim. 447.

(*a*) *Carne v. Brice*, 7 Mees. & W. 183; 8 Dowl. P. R. 884: see also chap. 9, *infra*.

(*b*) *Ashton v. M'Dougall*, 5 Beav. 56.

(*c*) 9 Ves. 521.

(*d*) 1 Ball & Beat. 49: see also *Parkes v. White*, 11 Ves. 210.

and a suit instituted by the mortgagee, Lord Manners decided that A's separate estate was bound by the grant.

It will be noticed that this case is an additional instance of the wife's power of disposition over her real estates during the marriage, when they were not conveyed to trustees, and the power rested merely in agreement between her and her husband before the coverture. (a)

20. Notice must here be taken of *Mores v. Huish* (b), a decision of the same judge who determined the case of *Whistler v. Newman*. (c) There the wife's freehold estates were vested in trustees, upon trust yearly to receive and pay the rents to her (A, the wife of B), as and when the same were received, or otherwise in their discretion to permit her and her assigns to receive them during her life, for her sole and separate use, notwithstanding her then present, or any future coverture. Her receipt was declared to be a sufficient discharge for the rents, and that they should not be liable to the debts, &c. of her then or any future husband, but be solely at her disposal. The trustees after A's death were to pay the rents to B for life, and upon his decease to convey the estates to the children in tail general, and in default of issue, to the survivor of A and B in fee. A and B granted an annuity to C, secured upon the estates; but before the deeds were executed, the surviving trustee gave notice to the annuitant, that he would not consent to any mortgage or alienation, and informed him of the extravagance of B, the husband, who could give no security. Notwithstanding this caution, the purchase of the annuity was completed. A bill was filed by C, to subject the rents of the wife's separate estate to the payment of the annuity. But Lord Rosslyn dismissed the bill, with costs: first, because he doubted the power of a married woman to give such a security; secondly, because she had no power of appointment

(a) See *suprà*, p. 56.

(b) 5 Ves. 692.

(c) Stated *suprà*, p. 222.

given to her; and thirdly, because the trust was that the trustees were to receive the rents and pay them from time to time to the wife's separate use; and fourthly, because C had notice from the surviving trustee not to complete the purchase.

21. Upon this case Mr. Roper observes (a): "To the first and second reasons it may be answered (as it has been before proved (b)), that the wife has absolute dominion over her separate property, and without the authority of a special power, to dispose of it as she pleases. Under this the wife's general power to alien her separate estate, the cases stated in the beginning of this section were decided. To the third reason it may be replied that the words 'from time to time' did not occur in this case, but that if they had occurred, or if the words used, viz. 'as and when received,' be of the same import, their insufficiency to restrain the wife's general power of disposition incident to her having separate property, has been before shown, and will further appear from the cases after stated in this section. And with respect to any difference being made by the trust being express that the trustees should receive and pay the rents to the wife, it cannot be contended with any degree of plausibility that it amounts to more than a mode to give the property to her separate use and disposal. *Hulme v. Tenant* (c) was a trust of this kind, and yet Lord Thurlow, after great consideration, held that such trust did not preclude the wife's power as a feme sole to alien her separate interest. And in *Parkes v. White* (d), Lord Eldon considered a trust like the present to mean no more than a gift to the wife's separate use.

"In answer to the fourth reason assigned by Lord Rosslyn, I shall state the case of *Essex v. Atkins* (e), which is also an additional instance of the grant of an annuity by a married woman out of her separate estate being supported. There

(a) 2 Rop. H. & W. 249.

(d) 11 Ves. 209.

(b) *Suprà*, p. 224.

(e) 14 Ves. 542.

(c) 1 B. C. C. 16; 2 Dick. 560.

the object of the bill was to establish the grant of an annuity out of 3000*l.* 5 per cent. Bank annuities bequeathed to A before her marriage with B, which were not to be subject to the debts, control, or engagements of any after-taken husband. The wife insisted by her answer that she did not voluntarily consent to the transaction, but that her concurrence was obtained by duress. Evidence was produced on the part of the annuitant, that the business was explained to the wife, and that she was anxious that it should proceed; that the deed was read to her, and that she appeared satisfied. It was also proved that one of the executors or trustees informed the annuitant before the transaction was completed, that he and his co-executors would not pay any of the dividends except to A, and that he also stated to the annuitant complaints made by the wife of her husband's ill-treatment in consequence of her refusal to join him in raising money; the executor also produced the will. Under these circumstances the question was, whether the Court would enforce payment of this annuity out of the wife's separate estate? And Sir William Grant said that the only doubt which he had in the case arose out of Lord Rosslyn's judgment in *Mores v. Huish*, in which case the bill of a purchaser of an annuity was dismissed upon the ground that he had notice from the trustee of the wife that it was a very bad and improvident bargain, and that he never would consent to it: that in this case (*Essex v. Atkins*) the purchaser was cautioned against making the purchase by the trustee, upon the ground that the married woman had expressed great reluctance to pledge or part with her separate property for the accommodation of her husband, and that if he did purchase, they never would pay; therefore, according to Lord Rosslyn's opinion in *Mores v. Huish*, the Court ought not to interpose under such circumstances, for the purpose of giving effect to the purchase. After thus comparing the two cases, his Honour observed, in opposition to Lord Rosslyn's opinion, that it was only in equity that the contract of a married woman with regard to

her separate property could be enforced; the Court, therefore, must of necessity decide upon its validity, and could not leave the purchaser to a legal remedy, because he had none; so that not to act was the same thing in effect as setting aside the contract; and his Honour added, that he did not know how he could say that the annuitant ought to have no remedy of any kind, except upon the ground that there was no valid contract. The Master of the Rolls then, in allusion to the opinions of Lords Thurlow and Rosslyn, observed, that in some cases Lord Thurlow acted with extreme reluctance for the purpose of giving effect to the improvident engagements which the wife had entered into; yet he did not think himself at liberty to say that the Court would not at all interpose where the subject was entirely of equitable jurisdiction. Upon the effect of the assent or dissent of trustees upon the wife's power of disposing of her separate property, his Honour remarked, that if the transaction could not upon its own merits be impeached, he did not see how any declaration by the trustee in this case could render it null and void. The established doctrine was (notwithstanding Lord Rosslyn's doubt), that a married woman can bind her separate property without the trustees, unless their assent is rendered necessary by the instrument giving her that property. (a) Their dissent, therefore, could not have any effect where their assent was unnecessary, and their declaration that she was unwilling could not be evidence of the fact that she parted with her property by coercion. Upon the whole, his Honour concluded, that if upon the evidence the wife was a free agent, and understood what she did, the Court had no choice, but must give effect to her contract; that the evidence proved her consent, and there was nothing in it which would have authorised the Court to set aside the agreement if she had filed a bill for the purpose. The contract was therefore enforced.

(a) See *infra*, p. 241.

“ This case, and the principle upon which it was decided, a principle that has been repeatedly acknowledged and acted upon both before and since *Mores v. Huish*, have taken away all authority from that case and from that of *Whistler v. Newman*, before stated. (a) ”

(a) *Suprà*, p. 222 : and see *Allen v. Papworth*, 1 Ves. Sen. 163.

CHAPTER III.

OF THE WIFE'S POWER OF DISPOSITION WHERE THE LIMITATION TO HER SEPARATE USE MERELY GIVES HER A PARTIAL INTEREST, WITH A POWER OF APPOINTING THE CAPITAL; AND OF THE CASES WHERE THE LIMITATION, THOUGH IN THE FORM OF A POWER, GIVES HER THE ABSOLUTE INTEREST.

SECTION I.

OF THE WIFE'S POWER OF DISPOSITION, WHERE THE LIMITATION TO HER SEPARATE USE MERELY GIVES HER A PARTIAL INTEREST, WITH A POWER OF APPOINTING THE CAPITAL.

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| <p>3. <i>Gift expressly for life, with power to appoint by will.</i>
 4. <i>Bradley v. Westcott.</i>
 6. <i>O'Keate v. Calthorp.</i>
 7. <i>Reid v. Shergold.</i>
 8. <i>Anderson v. Dawson.</i>
 9. <i>Conclusion from above cases.</i>
 11. <i>Effect of limitation to wife for life, and in default of appointment, to her executors or administrators.</i>
 12. <i>Mr. Roper's opinion.</i>
 18. <i>Mr. Jacob's remarks.</i>
 14. <i>Opinion of V. C. Wigram.</i></p> | <p>15. <i>Ultimate limitation to wife's executors "for their own use and benefit."</i>
 16. <i>Limitation for wife's separate use for life, to be absolutely her's if she survives, with power to appoint on dying before husband.</i>
 17. <i>Richards v. Chambers.</i>
 18. <i>Lee v. Muggeridge.</i>
 19. <i>Mr. Jacob's remarks.</i>
 21. <i>Trustees need not join in appointment unless their concurrence expressly required.</i></p> |
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1. IN the instances which we have before considered, no particular mode of disposition was prescribed for the wife to dispose of the funds settled to her separate use; consequently, any appointment of them in writing was sufficient. But there are cases in which, in addition to a limitation of property to the wife's separate use, she has expressly given to her a power of appointment.

2. In what instances it will or will not be necessary for the wife to execute the powers so given to her, depends upon the point whether, from the effects of the gift or limitation of the property to her, she takes an estate for life only to her separate use, with a power to dispose of the capital, or whether (although the fund be apparently given to her so as merely to authorise her power over it by appointment) the limitation will amount to a gift of the absolute interest in the property, so as to enable her to dispose of it without the necessity of executing the power.

3. It is settled that where there is an express limitation *for life*, with a power to dispose by will, the interest is equivalent only to an estate for life, and the power is to be executed, *primâ facie* at least, by will, on the ground that a partial interest having been expressly given, it will not be permitted, contrary to the intention expressly declared to be enlarged by implication.

4. Thus, in *Bradley v. Westcott* (a), A bequeathed to his wife, B, all his personal estate to her sole use for life, to be at her absolute disposal during that period; and after her death he gave such of his wife's jewels, &c., household furniture, and plate, of which she should be possessed at her death, with 500*l.*, as she should by will appoint, and in default of appointment the same were to be considered as parts of his residuary estate. And Sir William Grant, M. R., decided that the wife took an estate for life only in the whole, with a power of appointment: his Honour justly observing that, since the testator had given to his wife in express terms an interest for life, he could not, under the ambiguous words afterwards thrown in, extend that interest to the absolute property; which words he must construe with reference to the express interest for life previously given, viz. that she was to have as full, free, and absolute disposition as a tenant for life could have. (b)

(a) 13 Ves. 445. 451: see *Anon.*
3 Leon, 71.

(b) See *Tomlinson v. Dighton*, 1
P. W. 149: *Nannock v. Horton*, 7

6. So, in *O'Keate v. Calthorpe*(*a*), 4099*l.* old South Sea annuities, and other funds, were transferred by marriage articles to trustees, in trust to permit the wife to receive the profits to her separate use, and if she survived, to transfer the whole to her; but if she died before her husband, then to transfer the property according to her appointment, by deed or will; and in default of appointment, to the issue; and if none, then to the husband and the wife's brother, in moieties. She made no appointment. Upon a bill praying that part of the funds might be applied as the wife should appoint, the Court said, that if she had any power over the principal, let her make an appointment, the effect of which would be considered; but till then the Court would not interfere. Here, however, if the wife had appointed, according to the suggestion of the Court, the appointment would have had no effect upon the capital fund during the marriage, nor at its termination, unless she died before her husband.(*b*) The case, however, manifests what the Chancellor considered to be the law of the Court in the year 1739, when the decree was made, viz. that when the wife took for life, with an absolute power of appointment, the Court would not decide anything in regard to the capital, except upon her appointment under the power.

7. In *Reid v. Shergold*(*c*), the testator devised his copyhold estates to trustees, in trust for the sole use and benefit of his niece, B, for life; and the trustees were directed to pay the rents and profits, or suffer B to receive them for her own use, notwithstanding her marriage, and after her death the estates were to be in trust for the sole use and benefit, and for the maintenance of B's daughter C, who was to have

Ves. 392. 394. 398: *Reid v. Shergold*, 10 Ves. 370: *Anderson v. Dawson*, 15 Ves. 532: *Reith v. Seymour*, 4 Russ. 263: *Archibald v. Wright*, 7 Law J. N. S. Chan. 121; 2 Jur. 759.

(*a*) 8 Ves. 177.

(*b*) See Appendix, No. 4.

(*c*) 10 Ves. 370—380.

a conveyance of them at twenty-one, or upon the death of B; but if C died before twenty-one, then he gave the premises to such person or persons as B by her will, to be duly executed, should appoint. The trustees were empowered to sell the premises at the request of B, and the proceeds were to be invested, and they and the capital were to be upon the same trusts as before declared of the estates. And as to the testator's residuary real and personal property, he devised the same to his nephew D. The daughter C died under twenty-one, and before B, her mother; who having made a will under her power, and afterwards surrendered the legal estate of the copyholds (which she had previously acquired from the sole acting trustee) to a purchaser, in consideration of an annuity, Lord Eldon decided these three points; first, that B only took an interest for life, with power to dispose of the inheritance by will only, as required by the power. Secondly, that the surrender was a revocation of the will; and thirdly, that the surrender could not be considered an execution of the power; his Lordship observing that the testator did not mean that B should so execute her power; on the contrary, that he intended that she should give by will, or not at all; and that it was impossible to hold that the execution of an instrument or deed, which, if it availed to any purpose, must avail to the destruction of that power which the testator meant to remain capable of execution to the moment of B's death, can be considered in equity an attempt in or towards the execution of the power. His Lordship therefore decided that the purchase could not stand, as also for another reason, viz. that the consideration being an annuity, could not either at law or in equity be said to be within the intention of the power.

8. In *Anderson v. Dawson* (a), 600*l.* stock was vested in trustees, in trust for them to receive the dividends during the life of A, and to pay the same to her and her assigns,

(a) 15 Ves. 532.

notwithstanding her coverture, for her sole and separate use for life; and after her death to transfer and pay the capital stock and dividends to such person and persons, &c., as A, notwithstanding coverture, in and by her last will, in writing, or by a writing in the nature of her will, to be executed, &c., should direct or appoint; and in default of appointment, &c., then in trust for A's next of kin, according to the statute of distribution. A having survived her husband, called for a transfer of the 600*l.* stock, under the idea that she was then absolutely intitled to receive it, notwithstanding the inference to the contrary arising from the limitation to her of the dividends only for life, with a power to appoint the capital by will; but Sir William Grant, Master of the Rolls, said, that A was merely intitled for life, with a power of disposition by will, and that therefore he could not decree that the trustees should transfer to her, or according to her direction, and he dismissed the bill.

9. From the cases before stated, the following conclusions may be drawn: that when the wife takes an express estate for life in the fund, with a power to appoint the principal after her death, in such instances the wife can only dispose of the capital by an execution of her power, which may be immediate, if the power authorise a deed; but if it require the appointment to be made by will only, the disposition cannot take effect till after the appointor's death, and the wife is precluded from making an immediate disposal of the fund. (*a*)

10. *Sockett v. Wray* (*b*), decided by Lord Alvanley, is also an authority for the latter proposition; and although the decision has been disputed, yet it is conceived that the principle acknowledged in *Reid v. Shergold* and *Anderson v. Dawson*, before stated, supports the decree. The trusts declared in *Sockett v. Wray* were, that the trustees should from time to time during the life of A, the wife of B, pay

(*a*) *Doe v. Thorley*, 10 East, 438. (*b*) 4 Bro. C. C. 483.

the dividends of 1234*l.* three per cent. consols into the proper hands of A, for her sole and separate use, and after her death upon trust "to transfer the capital to such person or persons, at such time and times, in such parts, &c., and in such sort, manner and form, subject to such powers, provisoes, conditions, restrictions, and limitations as A, by herself alone, whether sole or covert, and notwithstanding her then present coverture, during her life, by her last will and testament in writing, or any writing purporting to be her last will and testament, to be by her signed and published in the presence of, and attested by two or more credible witnesses, should give, bequeath, direct, or appoint." The ultimate limitation in default of appointment was to A, her executors or administrators, for their own use and benefit. Lord Alvanley held that the wife could not by deed or other irrevocable act dispose of the capital fund, but only by an ambulatory and revocable act, viz. by a will or any instrument in the nature of a will.

11. It has been intimated in some of the cases, that although an express estate be given to the wife's separate use for life, with a power to dispose of the principal, yet if, in default of appointment, such principal be limited to her executors or administrators, and not to her next of kin, the absolute interest in the fund will vest in her, and be disposable with her husband's concurrence, without resort to the particular power given her for the purpose. The principle of the distinction is this: that in the former case the wife is to be considered complete mistress or owner of the property, the effect of such limitation being compared to that of a limitation to her right heirs, which, in the instance of real estates, vests the absolute inheritance; but that in the latter case the limitation to the wife's next of kin being the same in effect as that to particular heirs, which, if the subject were lands, would not pass the fee to a donee or devisee, will not therefore vest the absolute interest in personal estate in the wife, and consequently,

that in order to dispose of the capital, the wife must have resort to her special power.

12. Mr. Roper, however, is of opinion (*a*), that this analogy between real and personal estates is not applicable to the subject now under consideration; but that when the limitation in default of appointment is to the wife's executors or administrators, it will be required that she should execute her power in order to dispose of the fund during her marriage. (*b*) "The reasons," he remarks, "are these: admitting the limitation to impart to the wife the absolute interest in the fund, yet she being a married woman, the effect of such a limitation to her is quite different from a similar one to a man or to a single woman; for in the instance of such a limitation to a married woman who is under a legal incapacity to dispose of property during coverture, there is no repugnancy nor inconsistency between a limitation to her of the absolute interest, and a particular power of disposition over it during the marriage, as appears in a former part of this work relating to powers, and also under the title 'curtesy,' where it is shown that an equitable interest for the wife's separate use for life in real estate, and the ultimate limitation to her of the fee simple, do not unite in such a manner as to merge the particular estate and extinguish the special limitation to her separate use for life. (*c*) The analogy, therefore, mentioned in the commencement of these observations, is inapplicable to limitations to married women, and it does not authorise the conclusion that when the wife has an estate to her separate use for life in personal property, with a power of appointment, and the absolute interest is limited to her if she do not execute the power, she has, in analogy to similar limitations of real estates at law, such an absolute estate as of necessity enables her to dispose of the property without regard to her special authority to do so. This necessity,

(*a*) 2 Rop. H. & W. 212.

(*c*) See *suprà*, vol. I. p. 138

(*b*) See Appendix, No. 4.

therefore, not existing, and when the settlor's intention in giving such a power is considered, as also the anxiety of a Court of Equity to protect the wife's property against improvident dispositions of it from restraint, &c., during the marriage, it seems but reasonable that when an express estate for life in personalty is limited to her for her separate use, with a power of appointment, and in default of its execution to her, her executors or administrators, the same appointment should be considered necessary, as has been decided to be so when the ultimate limitation in default of appointment is to her next of kin. (a) "

13. Mr. Jacob remarks (b), "a distinction is to be noticed between those cases where, after a limitation to a party for life, with a power of appointment, the principal is limited, in default of appointment, to the same party or to his or her representatives, and those in which, in default of appointment, the principal is limited or results to other persons. In cases of the latter class, the donee has not the absolute interest; if the power be not exercised, the limitation in default of appointment takes effect and vests the principal in others; it can therefore only be disposed of by virtue of the power. *Bradley v. Wescott* (c), *Croft v. Slee* (d), *O'Keate v. Calthorpe* (e), *Reid v. Shergold* (f), and *Anderson v. Dawson* (g), are cases of this kind. In cases of the former class the donee has the entire beneficial interest in the principal, and consequently (if not under disability) may dispose of it independently of the power, by virtue of the general right of alienation which is incident to property. But if the donee be a *feme covert*, her absolute right to the property does not carry with it a general right of alienation, unless the property be given to her separate use. If the principal be in effect given generally to her separate use,

(a) See *Anderson v. Dawson*,
stated *suprà*, p. 234.

(b) 2 Rep. H. & W. 200 n.

(c) Cited *antè*, p. 233.

(d) 4 Ves. 60. 64.

(e) Cited *antè*, p. 233.

(f) *Ibid.*

(g) Cited *antè*, p. 234.

she has an unqualified power of disposition ; if not, it seems that she can only dispose of it by means of the power. (a) ”

14. The point was considered in the late case of *Holloway v. Clarkson* (b), where a testator directed the produce of his estate to be divided among several persons, some of whom were married, and others were unmarried women, and he directed that the shares of each such as were females should be for her separate use during her life, and after her decease upon such trusts as she should by deed or will appoint, and in default of appointment, in trust for her executors, administrators, and assigns, as part of her personal estate; the married and unmarried women being desirous of having the opinion of the Court as to their immediate power of dealing with their shares, Sir J. Wigram, V. C., after remarking that any opinion which he might express would be extrajudicial, and holding that the unmarried women might make an immediate disposition (c), said that he felt more difficulty with respect to the power of the married women. In the case of real estate, the estate for life of A preceding mesne limitations, and followed by a remainder to the heirs of A, amounted to a fee; but the principle did not extend to give by analogy an absolute interest in personal estate to a married woman, on a limitation to her for life, with remainder to her executors, administrators, and assigns. The mere fact of taking a life estate in personal property had not the effect of enlarging the operation of the gift in remainder to the same person. The married legatees might of course exercise the particular power which the will gave them: whether they could during their coverture in any other manner dispose of their shares in the fund, was a question which the authorities induced him to abstain from deciding until it was regularly before him. (d)

(a) See further on this subject, *Heatley v. Thomas*, cited *post*, p. 244; *Socketts v. Wray*, cited *antè*, p. 235; and *Lee v. Muggeridge*, cited *post*, p. 241.

(b) 2 Hare, 521.

(c) See *Devall v. Dickens*, 9 Jur. 550; 2 Eq. R. 267.

(d) On a subsequent day petitions were presented by the married wo-

15. In the case of *Sanders v. Frank* (a), Sir Thomas Plumer, V.C., held that a limitation of personal estate to a widow in her husband's will during life, with a power of appointment after her death, and in default of such disposition to her executors or administrators *for their own use and benefit* (b), did not vest the absolute interest in the widow, but that she had an estate for life only, with a power to dispose of the fund, upon the principle that the executors or administrators took as purchasers in their own rights, and not by representation.

His Honour then said it had been observed that a gift of personal estate to a person, his executors or administrators, was equivalent to a gift to such person and his heirs of real estate, and that it was so because each disposition carried the whole interest; but that in this case the bequest being to the executors or administrators, for their own use and benefit, gave them the property beneficially, and not as trustees; that a gift to the heirs of A B of lands was no gift to A B, and by the same analogy a gift of personalty to the executors or administrators of A B, for *his and their own use and benefit*, was no gift to him. He therefore decided, that the will having been neither executed nor attested, was a void execution of the power, and that the property belonged to the widow's administrator by purchase, and not by representation.

16. An express provision that in the event of the wife surviving the property shall be absolutely hers, implies an exclusion of a power of so appointing it during the coverture as that it shall not in that event belong to her. Instances of such a limitation will be found in the cases of *Richards v. Chambers* (c), and *Lee v. Muggeridge*. (d)

men for transfers of their shares, and his Honour considering the petitions equivalent to an appointment, made the orders, 2 Hare, 527.

(a) 2 Mad. 147. 155.

(b) In *Socket v. Wray*, cited *su-*

pra, the ultimate limitation was in the same terms: but see *Wellman v. Bowring*, 1 Sim. & Stu. 24, and p. 202, *antè*.

(c) 10 Ves. 380.

(d) 1 V. & B. 118.

17. In *Richards v. Chambers*, personal property was settled on the marriage, in trust for the sole and separate use of the wife for life; and if she survived her husband it was to be absolutely hers; if she died in his life, it was to go to such persons as she should by deed or will appoint; and in default of appointment, to her executors or administrators. It was held by Sir W. Grant that she could not, during the coverture, make an absolute disposition of the principal.

18. In *Lee v. Muggerridge*, the marriage settlement contained similar limitations, excepting that the power of appointment was to be exercised by will: and it was decided by Sir W. Grant, that the wife could not during the coverture dispose of the principal, and consequently that a bond given by her in her husband's lifetime did not bind the property after his death.

19. In these cases, as Mr. Jacob notices (*a*), the power did not authorise an immediate disposition, and the property not being given to the wife's separate use generally, she could not affect the principal, except by virtue of the power.

20. So, in the late case of *Nixon v. Nixon* (*b*), where the fund was limited in trust for the separate use of the wife during the joint lives of herself and her husband; and if she should survive him, then in trust for her and her assigns for her life, and after her decease, as to one moiety of the fund, for her use, to be disposed of by her in such manner as she should, by deed or will, notwithstanding her coverture, direct, it was held by Sir E. Sugden, C., that she could not dispose of the moiety during the coverture.

21. Where an appointment by the wife is necessary, the trustees acting on her behalf need not join as parties to it, unless their concurrence be expressly required by the power. (*c*)

(*a*) 2 Rep. H. & W. 211.

(*b*) 2 Jones & Lat. 416.

(*c*) *Grigby v. Cox*, 1 Ves. Sen.

518: *Essex v. Atkins*, 14 Ves. 547:

Pybus v. Smith, 1 Ves. Jun. 169.

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SECTION II.

OF THE CASES WHERE THE LIMITATION, THOUGH IN THE FORM OF A POWER, GIVES TO THE WIFE THE ABSOLUTE INTEREST.

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| <hr/> 1. <i>Wife may in such cases dispose of fund without exercising special power.</i>
4. <i>Hales v. Margerum.</i>
5. <i>Mr. Roper's remarks thereon.</i> | <hr/> 6. <i>Heatley v. Thomas.</i>
7. <i>Mr. Jacob's observations thereon.</i>
9. <i>Whether wife must exercise special power where her interest for life only.</i> <hr/> |
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1. THE express gift of an estate for life being the ground and principle, as before noticed, why the general power of disposition over the fund limited to the tenant for life prevents such interest from merging, and vesting absolutely in him or her the property to which such power of disposal is attached, it seems to be a necessary consequence that if no preceding express life estate be given to the donee of such a power, the absolute interest will pass by it. If, then, the fund be given to the wife, to be "at her sole and separate disposal," or to be disposed of by her "by will or deed," notwithstanding coverture (*a*); the absolute interest will vest in her, which she may dispose of as a feme sole under her general power to do so, and without any of the ceremonies required by the special power provided for her.

2. Thus, in *Elton v. Sheppard* (*b*), A bequeathed to trustees 2000*l.*, "in trust to pay the interest to her daughter B, the wife of C, for her own sole and separate use, and she authorised, empowered, and appointed B to give and dispose of the 2000*l.* as B should by any will or writing under her

(*a*) *Robinson v. Dugate*, 2 Vern. 108: and see *Lomas v. Matthews*, 181: *Maskelyne v. Maskelyne*, Ambl. 4 Law J. N. S. Chan. 238.
750: *Phillips v. Chamberlaine*, 4 Ves. 51. 58: *Hixon v. Oliver*, 13 Ves. 532.

hand direct and appoint." And the Master of the Rolls was of opinion that the first words, "in trust to pay the interest to B for her separate use," being unaccompanied by words limiting the duration of the trust, gave her the absolute interest, and that the subsequent words giving her the power of appointment were merely an anxious expression of the testatrix's intention that B should have an uncontrolled power of disposing of the fund. He therefore declared that B was absolutely intitled to the 2000*l*.

3. There is a species of limitations (very similar to those in which the wife takes only an estate for life, with a power of appointment) which, without minute attention, are likely to mislead, since such limitations have been held to give the wife an absolute interest, on the ground that it was the testator's intention that the wife should have the property absolutely, qualified and guarded only during the coverture in respect of her situation as a married woman, and to prevent the fund, upon her death, becoming the property of her husband as her administrator, in the event of his being the survivor. Of this class, the above case of *Elton v. Sheppard* may be considered one.

4. In *Hales v. Margerum* (a), A gave to his executors 1000*l*., in trust for the sole and separate use and benefit of his daughter B, and not to be liable to the debts, &c. of her then present or any future husband; and that all interest which should become due after the testator's death should be paid to B for her own separate use and benefit only, whose receipt, notwithstanding coverture, should be a good discharge; that whenever B died the 1000*l*. should be absolutely in her own power to dispose of by her will, or any deed or writing purporting to be her last will, to any person or persons, &c. notwithstanding her coverture, at her death or any other restriction. But in default of any such disposition or appointment, then the 1000*l*. should belong to

(a) 3 Ves. 299.

the testator's grand-daughter, C. Lord Alvanley, M. R., held that B, under the above limitation, took an absolute interest in the 1000*l.*, and that it passed by her will as her own property, and not under the power.

5. Upon this case Mr. Roper observes (*a*) that the first trust declared of the money was absolute in favour of the wife for her separate use, and that the subsequent qualifications were merely added in consideration of her then state of coverture, and were not intended to abridge the absolute interest first given to her. However, as Mr. Jacob notices (*b*), the Court, in holding that the daughter took the absolute property, seems to have disregarded that part of the will by which the fund was, in one event, given to the grand-daughter.

6. The case of *Heatley v. Thomas* (*c*) is similar in principle to the last, and arose upon a settlement by which the wife's legacy of 2000*l.*, and her annuity of 150*l.*, were vested in trustees upon trust for the sole and separate use and benefit of the wife during the then intended marriage between her and B, the interest of which was to be paid half-yearly during the coverture to the wife's proper hands for her sole use and benefit; and it was declared that she might during the marriage, by her will in writing, or any writing purporting to be her will, signed by her and attested by two or more credible witnesses, give or dispose of the 2000*l.* and the interest to such person or persons, &c.; and that if she died before her husband, B, and without making any will or other disposition, then that upon her death before B, the same was to be divided according to the statute of distribution, in case she had died intestate and unmarried. The wife and her husband joined in a bond as a surety for C, who having become a bankrupt, the question was, whether the obligee could affect the wife's separate estate? And Sir William Grant, M. R., decided in the affirmative.

(*a*) 2 Rop. H. & W. 203.

(*c*) 15 Ves. 597.

(*b*) Ibid. 203 *n.*

7. Upon this decision Mr. Jacob remarks (*a*), "The report of this case does not contain the grounds of the decision: but from the observations of Sir William Grant on a subsequent occasion (*b*), it appears that he considered that the settlement in effect gave the principal to the wife's separate use generally. He stated that there was a declaration of trust as to the whole fund for the sole and separate use of the wife, not as to the interest only. The other directions he thought were rather consequential to this declaration than contradictory to it. There was not an express provision, that in the event of the wife surviving, the property should be absolutely hers: which would imply an exclusion of a power of so appointing it during the coverture, as that it should not, in that event, belong to her: and farther, it was to be collected from the whole instrument, that she was to have a power not only of appointing by will, but of disposing of the fund in any other manner. The construction that the settlement was intended to give her a power of appointing otherwise than by will, derived support from the part providing for the event of her dying without making any will or *other disposition*; but the above remarks do not entirely accord with the statement of the settlement contained in Vesey, according to which it was provided that the fund was to belong to the wife in the event of her surviving. (*c*)"

8. In the late case of *Tawney v. Ward* (*d*), where a testator desired his daughter's share to be secured in the funds, and for his trustee to pay her the dividends, and he wished that neither the principal nor the interest of the funds should be subject to the control of any husband she might marry, but that the same should be subject to her will only properly executed, whether covert or sole, at her decease, it was held that the daughter took an absolute interest.

(*a*) 2 Rop. H. & W. 204 n.

(*d*) 1 Beav. 563: see also *Baker*

(*b*) *Lee v. Muggeridge*, 1 Ves. & B. 123.

v. Newton, 2 Beav. 112; 3 Jur. 649: and *Mayer v. Townshend*, 3

(*c*) 15 Ves. 598.

Beav. 443.

9. The preceding observations apply to the powers of disposition by married women of the absolute interest in the capital of the fund. It sometimes happens that a wife is only intitled for life to interest or rent of the property to her separate use ; and it has been before noticed, that if no particular power to dispose of them be given, she may do so under her general power as a feme sole. (a) It is conceived that this general power will not be suspended by any particular mode prescribed in the instrument limiting to her the property, upon the principle that the wife, having a general power resulting from the estate for life given to her separate use, she may either dispose of her interest under such general power (unless she be restrained by express words from alienating by anticipation), or she may dispose of it in the particular manner prescribed by the special power. Upon this principle, as it would seem, Sir William Grant decided the case of *Chesslyn v. Smith* (b), and upon the same principle the decisions in *Elton v. Sheppard*, *Hales v. Margerum*, and *Heatley v. Thomas* appear to depend. (c)

10. If, therefore, the interest of a fund be directed to be paid as A, a married woman, should appoint by note or writing under her hand, and for want of such appointment, then into her own hands for her separate use for life, it is conceived that A may dispose of it either under her general power incident to her life estate, or by the particular mode prescribed by the special authority. (d)

(a) *Antè*, chap. 2.

(b) 8 Ves. 183.

(c) Cited *suprà*, p. 242. *et seq.*

(d) See *Witts v. Dawkins*, 12 Ves.

501 : *Brown v. Like*, 14 Ves. 302 :

Bullpin v. Clarke, 17 Ves. 365 : and

Stead v. Nelson, 2 Beav. 245.

SECTION III.

IN WHAT CASES RELIEF WILL BE GIVEN IN EQUITY, WHERE
THE WIFE HAS MADE A DEFECTIVE APPOINTMENT.

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| <hr/> 2. <i>Appointment supplied in favour
of purchaser, incumbrancer, or
creditor.</i> | <hr/> 3. <i>But not of husband.</i>
4. <i>Or volunteer.</i>
5. <i>Non-execution not remedied.</i> <hr/> |
|---|---|

1. WE have just seen that when the wife takes only a partial interest, as for life, with a power to appoint the capital, she must duly execute such power, in order to pass the absolute interest in the fund.

2. But when the appointees are purchasers, incumbrancers, or creditors, defective executions of powers are supplied by courts of Equity in favour of such persons. And defective appointments, when made by married women, form no exception to this rule. (*a*)

3. It has been already noticed that a defective execution of a power by the wife in favour of her husband, unless where he claims as a purchaser, will not be supplied. (*b*)

4. Nor will a defective execution of a power be supplied where the appointee is a volunteer. (*c*)

5. And Equity will not interfere if no attempt has been made to execute the power. (*d*)

6. However, where the wife has neither power over, nor interest in, the capital, but the annual produce only is limited to her separate use for life, with a particular power to dispose of it, not amounting to a prohibition to alien it

(*a*) See 2 Sug. Pow. 96, 7th ed.:
and *Dowell v. Dew*, cited p. 60,
antè.

(*b*) Vol. I. p. 31, *antè*.

(*c*) 2 Sug. Pow. 95, 7th ed.
(*d*) *Bull v. Vardy*, 1 Ves. Jun.
270: see also 2 Vern. 69: 1 Bro.
C. C. 21: 17 Ves. 388. 460. 462.

by anticipation, or where she takes an absolute interest in the fund, accompanied with certain powers or qualifications for the disposal of it, merely prescribed in consequence of her condition as a married woman; in these cases, since special appointments under the particular powers are unnecessary, there is no occasion for a court of Equity to supply any deficiencies in them, it being presumed that, if the wife by deed or will purport to dispose of or incumber her separate estate, the disposition will take effect out of her separate interest, if it cannot do so under a due execution of her power.

CHAPTER IV.

OF THE LIABILITY OF THE WIFE'S SEPARATE ESTATE TO HER DEBTS AND CONTRACTS; AND OF HER SEPARATE CHARACTER IN EQUITY IN REGARD TO PROCEEDINGS BY OR AGAINST HER.

SECTION I

OF THE LIABILITY OF THE WIFE'S SEPARATE ESTATE TO HER DEBTS AND CONTRACTS.

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| <p>6. <i>Wife's general contracts binding on separate estate, semble.</i></p> <p>7. <i>Wife's separate estate charged by her bond.</i></p> <p>9. <i>Hulme v. Tenant.</i></p> <p>11. <i>Or promissory note.</i></p> <p>13. <i>Or promise in writing.</i></p> | <p>14. <i>Contracts in reference to separate estate enforced in equity.</i></p> <p>15. <i>Wife, having separate estate, may contract for purchase of estate.</i></p> <p>16. <i>But the Court can proceed only against the property.</i></p> |
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1. It has been observed (a) that by the common law, restored by the case of *Marshall v. Rutton* (b), a married woman was not allowed, except in special cases, to contract as a feme sole, nor, as such, to sue or be sued. That being the legal rule, the wife cannot at law bind herself by any contract in regard to her separate property. In conformity with this doctrine of the wife's disability, courts of Equity have held that her general personal engagements will not affect her separate property. (c)

2. This was so decided by Lord Rosslyn in the case of *The Duke of Bolton v. Williams*. (d) In that case the

(a) *Suprà*, p. 69.

(b) 8 Term Rep. 547.

(c) 2 Dick. 562. 14 L.J.R. 452.

(d) 2 Ves. Jun. 138: see 2 Dick. 562.

wife granted annuities for value out of a rent-charge, being her separate estate. These grants were void from defects in the memorials, but the annuities were nevertheless claimed by the annuitants and resisted by the wife. The owner of the land charged with the rent, not knowing to whom to pay it, filed a bill of interpleader; and one point insisted upon by the annuitants was, that if the grants were defeated by such omission as before stated, still they were intitled to be repaid their purchase-monies, with interest, out of the wife's separate estate. But it was held that the specific charges having failed, the annuitants became general creditors only of the wife for the purchase-money paid to her; and then, upon the principle that there was no equity for her general creditors upon which they could maintain a suit to enforce an appropriation of her separate property in the hands of her trustees for payment of their demands, the Court decided against the claims of the annuitants.

The remarks of Lord Eldon upon this case are these, "that it decided, in the most direct terms, that where a married woman, having separate property, has sold an annuity charged upon it, and the grantee has not taken care to make the charge available (for it was his business to do so), the person, whose grant as such fails, would not have an equity specifically to affect the fund clothed with a trust for the separate use of the married woman with the consideration; that Lord Rosslyn considered the case in two points of view, at law and in equity, and said, if the annuitants had an action, there was no occasion for equity to interfere; that if they had no action, there was no ground upon which a court of Equity could interfere." (a)

3. The authority of *Bolton v. Williams* was followed by Lord Eldon, in the case of *Jones v. Harris* (b), from which the above extract is taken. There it appeared that A was

(a) 9 Ves. 498.

(b) Ibid. p. 486: see also 3 Mad.

94: and *Aguilar v. Aguilar*, 5 Mad.

414.

intituled to the rents of real estates to her separate use ; out of which she granted an annuity to B, but the grant was void from the insufficiency of the memorial. Upon the bill of B for payment of the annuity out of the rents, the wife's separate estate, the same point was insisted upon as in the case of the Duke of Bolton *v.* Williams, viz. that as at law upon an implied *assumpsit* the grantee could recover in an action his purchase-money, carrying the payments upon the annuity into account, so in equity B, being disappointed in the contract for the annuity, was intituled to be considered as A's creditor, and although B had no lien upon the rents by virtue of the contract itself, still A having separate estate was to be considered in equity as debtor in respect of it, upon the ground of the implied *assumpsit*, and that the court would consider B, if to be regarded as A's general creditor, intituled to have the demand, due by virtue of that *assumpsit* (implied out of the failure of the contract), made good out of the rents and profits of A's separate estate. But Lord Eldon dismissed the bill upon the principle stated in the case of the Duke of Bolton *v.* Williams, and observed that there was great difficulty in raising the implied *assumpsit* to charge the separate estate, in opposition to the intention of both A and B, and to the authority of that case. B (said his Lordship) had no right to complain that the Court did not interfere upon such an application, merely to remedy negligence, and that if B had any complaint founded in moral justice, it was entirely B's own fault in not taking care to obtain a perfect security.

4. These cases were cited by Sir L. Shadwell, V.C., in *Murray v. Barlee* (a) ; his Honour remarking that he would have followed their authority, if the case before him had turned upon the liability of the wife's separate estate to her implied contracts.

5. However, Lord Brougham, C., when the case of *Murray*

v. Barlee came before him on appeal (*a*), expressed an opinion that there was no distinction between the wife's general engagements and her written instruments, and said that if there had been merely a general charge in that case he should have considered that the wife's creditor had a claim upon her separate estate.

6. And in a late case (*b*), the liability of the wife's separate estate to her general contracts appears to have been considered by Lord Cottenham as settled.

7. It is clear that bonds given by the wife will be a charge on her separate property.

8. Thus, in *Biscoe v. Kennedy* (*c*), leasehold and other personal estate were on the marriage of B settled in trust for her separate use. She was indebted by bond at the time of her marriage, and her creditor filed a bill for payment of it out of her separate property; and Sir Thomas Clarke declared that B's effects vested in her trustees were to be considered as the property of a feme sole, and ordered the debt and costs to be paid out of 500*l.* East India stock, in the hands of her trustee. (*d*)

9. So, in *Hulme v. Tenant* (*e*), upon the marriage of A, her freehold and leasehold estates were settled in trust that the trustees should receive and pay the rents and profits of parts of them to the wife, for her separate use, and to convey the estates themselves to such uses as she by will, or by deed or writing under her hand and seal executed in the presence of two witnesses, should appoint; and in default of appoint-

(*a*) 3 M. & K. 209: see *Callow v. Howle*, 17 Law J. N. S. Chan. 71; 11 Jur. 489.

(*b*) *Lord v. Wightwick*, 2 Ph. 110: see also *Owens v. Dickinson*, Cr. & P. 54: and some remarks by Mr. Jacob on this subject in App. No. 11.

(*c*) 1 Bro. C. C. 17, *in notis*.

(*d*) In this case the creditor's bill was in the first instance dismissed.

The husband afterwards absconded, and was outlawed, and the creditor then filed another bill for payment out of the wife's separate estate, which was decreed.

(*e*) 1 Bro. C. C. 16; 2 Dick. 560: see also *Pybus v. Smith*, 1 Ves. Jun. 189; 3 Bro. C. C. 340: *Dillon v. Grace*, 2 Sch. & Lef. Ch. Rep. 456: and *Standford v. Marshall*, 2 Atk. 69.

ment, to the use of her heirs and assigns. The trustees were directed to sell the remainder of the estates, and out of the produce to invest 1000*l.* according to A's directions, and the interest and profits were directed to be paid to her, and the principal to her or to her order, by note or writing under her hand, and for want of appointment, to her executors, &c. A and her husband joined in a bond to B, and she afterwards borrowed of B a further sum, which, with the old debt, amounted to 180*l.*, for which A gave her own bond. B filed a bill for payment out of A's separate estate, but the 1000*l.* were out of the question, that sum having been wholly or nearly disposed of. The only point was, how far the rents of the estates unsold, and the estates themselves, were liable to B's demand; and Lord Thurlow made no decision upon the liability of the estates themselves, but declared and decreed that the rents of her real estates were liable to satisfy the debt.

10. A similar decision was afterwards made in *Heatley v. Thomas*. (*a*)

11. So, promissory notes given by the wife have been held to be a charge upon her separate estate.

12. Thus, in *Bullpin v. Clarke* (*b*), upon the marriage of A with her husband B, several of her real estates were settled upon trust that the trustees should receive the rents and pay them to such person or persons, &c., as A at any time during her life, notwithstanding coverture, should appoint, and, in default of appointment, to pay them into "her proper lands for her sole and separate use." Her personal estate was also vested in the same trustees for her sole and separate use, and to be applied as she should direct. A borrowed 250*l.* upon her promissory note from C, who instituted the present suit to obtain payment of the debt out of A's separate property. And Sir W. Grant decreed

(*a*) 15 Ves. 596.

Sowle, 4 Russ. 112: and *Nail v.*

(*b*) 17 Ves. 365: see also *Stuart*

Punter, 5 Sim. 562.

v. Kirkwall, 3 Madd. 387: *Field v.*

that the principal, interest, and costs should be paid by the trustees out of the rents and profits of the estates.

13. Where the wife, who was living separate from her husband, promised her solicitors in writing to pay their bills, it was held that the letters had the same effect in charging her separate estate, as her bond or promissory note. (*a*)

14. The wife being considered as a feme sole in respect of her separate property, her contracts for valuable consideration, with reference to such property, will in equity be enforced against her. (*b*)

15. And where she has separate property, she can enter into a contract for the purchase of an estate as a feme sole. (*c*)

16. But in all cases the Court must proceed against the property, as, although she may become intitled to property for her separate use, she is no more capable of contracting than before. (*d*)

(*a*) *Murray v. Barlee*, 4 Sim. 82; affirmed by Lord Brougham, 3 M. & K. 209. (*d*) *Aylett v. Ashton*, 1 M. & C. 105; *Francis v. Wigzell*, 1 Madd. 258.

(*b*) *Stead v. Nelson*, 2 Beav. 245.

(*c*) *Dowling v. Macguire*, 1 Rep. t. Plunkett, 1.

SECTION II

OF THE WIFE'S SEPARATE CHARACTER IN EQUITY, IN REGARD
TO PROCEEDINGS BY OR AGAINST HER.

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| <hr/> 1. <i>Where plaintiff.</i>
2. <i>Where defendant.</i>
3. <i>Liable to answer personally for contempt of court.</i> | <hr/> 5. <i>But an order must be previously obtained for her to answer separately.</i> <hr/> |
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1. As at law the wife cannot sue or be sued without her husband being a party (*a*), so it is in equity; this distinction being observed, that when her suit is for her separate property, her husband should be made a defendant, and she alone be the complainant under the protection of her next friend. (*b*)

2. But when she is a defendant in a Court of Equity, the suit being to establish a claim upon her separate estate, she is so far considered as a single woman as to make it necessary to serve her personally with process in the cause. (*c*)

3. Since the wife is liable only to the extent of her separate property in the hands of her trustees, a Court of Equity merely operates upon it and not against her personally (*d*): but as she is clothed with the character of a feme sole in regard to such estate, and her husband is a mere formal party, and the Court cannot pronounce a decree to bind her separate property without her answer, &c., so that injustice might result from allowing her an exemption from the process of contempt, it has been determined that she is personally answerable for contempts in not obeying the

(*a*) *Marshall v. Rutton*, 8 Term Rep. 547.

(*c*) 9 Ves. 488.

(*b*) *Griffith v. Hood*, 2 Ves. Sen. 452.

(*d*) 1 Bro. C. C. 20.

orders of the Court, and may be committed to prison as any other person.

4. Thus, in *Bell v. Hyde* (*a*), and *Dubois v. Hole* (*b*), the wife was committed to prison for not putting in an answer; and in *Stansbury v. Watkins*, a case at the Rolls in the year 1772 (*c*), Sir Thomas Sewell ordered an attachment to issue against the wife alone.

5. But in *Carleton v. M'Enzie* (*d*), a wife executrix and residuary legatee answered the original bill jointly with her husband, the bill was amended, and her husband went abroad; and Lord Eldon determined that in such a case, a previous order that the wife should answer separately was necessary to bring her into contempt for not answering the amended bill.

(*a*) Pre. Ch. 330.

(*b*) 2 Vern. 614, ed. by Raithby: see *Pannell v. Taylor*, 1 Turn. & Russ. 96.

(*c*) Stated *in notis*, 2 Vern. 614: see also *Ottway v. Wing*, 12 Sim. 90.

(*d*) 10 Ves. 442: see also *Bunyan v. Mortimer*, 6 Mad. 278: and *Hardy v. Sharpe*, 3 Y. & C. Eq. Ex. 377: and *Daniell's Chancery Practice*, 2d. ed. by Headlam, where the subject of this section is fully discussed.

CHAPTER V.

OF THE WIFE'S ACTS REGARDING HER SEPARATE PROPERTY
IN FAVOUR OF HER HUSBAND, AND THE EFFECT OF HER
ACQUIESCENCE IN HIS RECEIPT OF IT.

SECTION I.

OF THE WIFE'S POWER OF DISPOSING OF HER SEPARATE
PROPERTY IN FAVOUR OF HER HUSBAND.

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| <p>1. <i>May dispose of separate estate to husband.</i></p> <p>2. <i>But she must appear in court where suit.</i></p> | <p>4. <i>Presence of wife in court not required in general on disposition of separate property.</i></p> |
|---|---|

1. In transactions between husband and wife, relative to the separate estate of the latter, she, *primâ facie*, will be viewed in the light of a feme sole, and as such be competent to dispose of it to him, or for his use, subject to proof of fraud or undue influence on his part. (a) To this effect Lord Hardwicke expressed himself in *Grigby v. Cox*. (b)

2. In *Milnes v. Busk* (c), Lord Rosslyn said that he had been informed it was very constantly the course of the Court, and particularly at the Rolls, where these causes usually came on, that where the trustees oblige the party to apply to the Court, it had not established a deed between husband and wife upon her separate estate without her actual presence in Court. (d) Upon this declaration of Lord Rosslyn, the Solicitor-General

(a) See *Essex v. Atkins*, 14 Ves. 542.

(b) 1 Ves. Sen. 518.

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(c) 2 Ves. Jun. 590.

(d) Upon this subject, see *suprà*, vol. I. p. 246.

observed, that Sir Thomas Sewell had said, that if trustees would not take upon themselves to act, but compel the parties to file a bill, they cast their discretion upon the Court, which would not act for them without the presence of the wife. It therefore seems that, when such transactions come before Courts of Equity, they will require the wife's presence, and, if necessary, direct inquiries into such transactions, to ascertain their fairness, and the circumstances under which the wife was induced to concur in them. (*a*)

3. In *Pybus v. Smith* (*b*), Lord Thurlow observed, that it was very fit, in the case of a married woman, that the Court should know how she had disposed of her property.

4. In general, however, the presence of the wife in Court, upon a disposition of her separate estate either to her husband or to strangers, is not necessary in order to pass her separate interest (*c*), since, as to such property, she has the same power of disposing of it as if she was a feme sole.

(*a*) *Parkes v. White*, 11 Ves. 231. also *Sturgis v. Corp*, 13 Ves. 190 :

(*b*) 1 Ves. Jun. 194. and *Bean v. Sykes*, 2 Hayes Convey.

(*c*) See Lord Eldon's observations 640, 5th ed.
in *Sperling v. Rochfort*, 8 Ves. 182 :

SECTION II.

WHERE THE WIFE IS INTITLED TO REIMBURSEMENT OUT OF HER HUSBAND'S ESTATE FOR WHAT HE HAS RECEIVED OF HER SEPARATE PROPERTY.

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| <hr/> 1. <i>Not where she has permitted husband to receive separate property.</i>
5. <i>If consent not given or presumed, intitled to reimbursement of whole amount.</i>
6. <i>Husband allowed sums expended for wife lunatic.</i> | <hr/> 8. <i>Wife's claim to arrears where consent implied.</i>
9. <i>Distinction between pin-money and separate estate in this respect.</i>
10. <i>Wife's consent in court unnecessary.</i> <hr/> |
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1. SINCE the wife may appoint and dispose of her separate property as a feme sole, so she may give it to, or permit her husband to receive it, which will preclude her right after his death to charge his estate with what he so received. This was acknowledged by Lord Hardwicke in *Pawlet v. Delaval* (a), in which case he decided, that Lady Pawlet having, during the joint lives of herself and husband, permitted him to call in, manage, and dispose of her separate estate as his own, and after his death treated by acts such her separate property as assets belonging to him, discharged the original limitation of it to her separate use, and gave it to her husband.

2. In *Smith v. Camelford* (b), the Court declared, that if the wife permitted her husband to receive the rents of her separate estate, he was not afterwards accountable to her for them. A like decision was pronounced in *Milnes v. Busk* (c), the wife having expressly empowered her husband to receive the rents of her separate estate during her life. *Powell v.*

(a) 2 Ves. Sen. 663.

(c) 2 Ves. Jun. 488.

(b) 2 Ves. Jun. 698. 716.

Hankey (*a*) is a case where a similar decree was pronounced upon her permission and acquiescence in her husband receiving the produce of her separate property; and in *Squire v. Dean* (*b*), where the husband received the interest of his wife's separate estate, and applied it to the use of the family, her assent to the receipt and application was presumed, and she was not permitted to claim anything on account of it out of her husband's assets.

3. On the presumption of the wife's assent, in the late case of *Beresford v. Armagh* (*c*), she was held not to be intitled to a balance of the rents of her separate estate which, at the time of her husband's death, was standing to his account in a bank.

4. Upon the same principle, where the trustees under a marriage settlement had lent the wife's money to the husband with her consent, it was held, on the bankruptcy of the husband, that they could only prove for the principal. (*d*)

5. But if no such consent be given, nor can be presumed, then the wife will be intitled to reimbursement out of her husband's estate for the whole of what he received of her separate property, as in *Parker v. Brooke*. (*e*)

6. Yet, in an instance where she was supported by him, and insane, and he received her separate estate, for which his own property was liable to answer (because his wife, so circumstanced, could neither authorise nor consent to his taking her separate estate), still, in consideration of his maintaining her, he was allowed in discharge a proper sum for what he expended in her support. The instance alluded to occurred in the *Attorney-General v. Parnter*. (*f*)

(*a*) 2 P. W. 82.

(*b*) 4 Bro. C. C. 326: see *Carter v. Anderson*, 3 Sim. 370: *Bartlett v. Gillard*, 3 Russ. 149: and *Leach v. Way*, 5 Law J. N. S. Chan. 100.

(*c*) 13 Sim. 643; 13 Law J. N. S. Chan. 235; 8 Jur. 262.

(*d*) *Ex parte* Green, re Ellis, 2 Deac. & Ch. 113; 11 Law J. Bank. 2.

(*e*) 9 Ves. 583.

(*f*) 3 Bro. C. C. 441; 4 Bro. C. C. 409: but see *Nettleship v. Nettleship*, 10 Sim. 236: and *Edwards v. Abrey*, 2 Ph. 39; 2 C. P. Coop. (t. Cot.) 177; 15 Law J. N. S. Chan. 404; 10 Jur. 650.

7. It cannot escape the observation of the reader that the principle which pervades the cases upon the subject is this; either express gift by the wife to her husband, or an implied gift to him (when it can be raised) of her separate estate, resulting from cohabitation and her acquiescence.

8. Upon this presumption it is, that if the wife without intermediate claim suffer her husband to receive the annual income of her separate estate, a Court of Equity will permit her, surviving him, to charge his assets in account with no more than the amount of one year's arrears, or for one year of his receipts preceding his death, according to some cases, and even not with one year's receipts or arrears according to others.

9. Mr. Roper remarks (*a*), "If, notwithstanding the *dicta* in some of the cases, a distinction may be considered to exist between property settled to the wife's separate use *aliunde*, and pin-money settled upon her by her husband, all or the majority of the cases may probably be reconciled.

"Thus, if the wife expressly or impliedly authorise her husband to receive the interest or rents of her general separate property, during his life, this being a gift, there can be no reason to give her any part of them which accrued during his life. With this agree the before-mentioned cases of *Smith v. Camelford*, *Powell v. Hankey*, and *Squire v. Dean*; and also *Whistler v. Newman* (*b*), and *Dalbiac v. Dalbiac* (*c*), after stated. But when the property settled is that of the husband or the wife, and he is under contract to pay to her annually a certain sum as pin-money, considered to be for her personal use, and a provision by him, in such a case as it may be detrimental to her to carry implied acquiescence on her part to the extent of excluding her claim to this provision up to her husband's death, it does not seem unreasonable that she should be allowed one year's arrears previous to that

(*a*) 2 Rop. H. & W. 221: see
chap. 8, *post*.

(*b*) 4 Ves. 146.

(*c*) 16 Ves. 126.

period, and so the Court has considered in the cases referred to below. (a) ”

10. Mr. Roper further observes (b), that as the gift or acquiescence of the wife will intitle her husband to her separate estate, so will her consent, given and recorded in a Court of Equity, have the same effect. But, as Mr. Jacob remarks (c), “the wife’s examination and consent is entirely unnecessary with reference to separate property. (d) Hence, in *Sturgis v. Corp*, the decree was made without the wife’s consent being taken, referring it to the Master to settle an assignment. (e) And an assignment or appointment by the wife is the regular mode of passing her separate property; her consent in Court can be of no use, excepting that it may sometimes save the expense of a deed; and the Court has therefore latterly, in some instances, declined taking the consent.”

(a) *Townshend v. Windham*, 2
Ves. Sen. 7: *Peacock v. Monk*, 2
Ves. Sen. 190: *Offley v. Offley*, Pre.
Ch. 26: see 11 Ves. 225; and 2
Madd. 286 n.

(b) 2 Rop. H. & W. 222.

(c) *Ibid.* 222 n.

(d) See 13 Ves. 192: 3 Madd.
385.

(e) Reg. Lib. B. 1806, fo. 108.

SECTION III.

WHETHER A BILL IN CHANCERY, FILED BY THE HUSBAND AND WIFE, WILL OPERATE AS A DISPOSITION OF THE FUND IN FAVOUR OF THE HUSBAND.

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2. *Chesslyn v. Smith.*
 3. *Clarke v. Pistor.*
 4. *Remarks thereon.*
 5. *Allen v. Papworth.*

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6. *Mr. Jacob's remarks thereon.*
 8. *Court will not act upon bill of wife and husband, semble.*
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1. IN some cases where the wife was intitled to the interest of the fund for life to her separate use, with a prescribed power to dispose of it, and upon her death the capital was given to her husband, on their filing a bill in Chancery, praying that the principal might be immediately paid to her husband, and the wife consenting to part with her life estate, the Court has ordered the fund to be paid or transferred to the husband.

2. Thus, in *Chesslyn v. Smith* (a), A, by deed, reciting that he was desirous of making a provision for B, his wife, during her life, directed the trustees named in it to invest 500*l.* in three per cent. consols, in trust to pay the interest during A's life in such manner as B should appoint by any note or writing under her hand, and notwithstanding her then marriage; but in default of such direction to pay the same into her hands for her sole and separate use; and after her death, if A survived her, upon trust for him, his executors and administrators; but if he died before her, then to pay the principal according to his appointment, and if he made none, then upon trust for himself, his executors, &c. The 500*l.* was invested by the trustees, against whom

(a) 8 Ves. 183.

A and B filed a bill, praying a transfer to A for his own use and benefit, upon his giving to the trustees his personal security. B consented, and Sir William Grant decreed according to the prayer of the bill.

3. To the same effect is the case of *Clarke v. Pistor* (a), which was decided at the Rolls in the year 1778. There the trust was to pay the dividends of 2000*l.* Bank Stock to such persons, &c., and in such manner and form as the wife should from time during her life, or notwithstanding her coverture, by any note or writing under her hand appoint, and in default of appointment into her proper hands for her separate use, &c., and after her death to transfer the capital to her husband. Upon the bill of the husband and wife against the trustees, the wife having made no appointment, the Court, with her consent, ordered a transfer of the fund.

4. The limitations in these cases, as the reader will have observed, amounted to nothing more than a trust for the wife's separate use for life, and she having, as incident to such an estate, a power of disposing of it *ad libitum*, such power superseded the special mode prescribed, a compliance with which, *in specie*, must have been considered by the Court as unnecessary. (b)

5. In *Allen v. Papworth* (c), Lord Hardwicke held, that if a married woman, having power to receive the profits of an estate to her separate use, and to appoint them as she pleased, filed a bill jointly with her husband for an account, and submitted that the profits should be applied in payment of his debts, and for which a decree was pronounced, such a bill, to which she was made a party without collusion, was as much an execution of her power as an actual appointment would have been, and the profits would be bound by the decree.

6. Upon this case Mr. Jacob observes (d), "It does not

(a) Cited 3 Bro. C. C. 568 : and
Gullan v. Trimbey, 2 Jac. & Walk.
457 n.

(b) See *antè*, p. 246.

(c) 1 Ves. Sen. 163.

(d) 2 Rop. H. & W. 226 n.

appear that the wife consented to the decree. See Belt's Supplement (*a*), where the substance of the pleadings is stated from the Registrar's Book, but it is difficult to collect from them what was the point decided. The opinion attributed to Lord Hardwicke, that the bill might operate as an appointment, is (to say the least) very questionable, a bill filed by a husband and wife jointly being in effect the bill of the former. (*b*) And though a power has been held to be executed by a declaration contained in an answer in Chancery (*c*), it does not follow that the same effect is to be ascribed to the contents of a bill, which may be altered by amendment. In this case a decree had been pronounced, and therefore it did not rest upon the bill alone."

7. Since the above observations, the case of *Simons v. Horwood* (*d*) has occurred, where the wife being intitled under a will to a fund, in terms which gave it absolutely to her separate use, the husband and wife filed a bill against the trustee, praying for a transfer of the fund to the wife, or to the husband in her right; but Lord Langdale, M. R., said that it was the husband's suit, and the wife, for all the purposes of the suit, must be taken to be entirely under the influence of the husband. The husband, therefore, could not obtain it in that suit.

8. It may therefore be considered as settled, that whether the wife's interest is such as she may dispose of independently of any special power, or she has merely a power to dispose of it, the Court will not act upon a bill filed by her and her husband.

(*a*) Page 88.

(*c*) *Carter v. Carter*, Mose. 369.

(*b*) See 2 Ves. Sen. 452. 666 : 1

(*d*) 1 Keen, 7.

Sim. & Stu. 188.

CHAPTER VI.

WHERE THE WIFE IS INTITLED TO RELIEF IN EQUITY AGAINST
DISPOSITIONS OF HER SEPARATE ESTATE.

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| 2. }
3. } | <i>Instances of wife not being re-
 lieved against her separate
 contracts.</i> | 6. <i>Parke v. White.</i>
7. <i>Scott v. Davis: sale to trustee
 set aside.</i>
9. <i>Effect of wife's acquiescence.</i> |
| 4. | <i>Sale to her trustee where sup-
 ported.</i> | |
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1. It has been before shown that a married woman is to be considered a feme sole in relation to her separate estate, and that she has power as such to give away or otherwise dispose of it. It follows from this proposition, that her equity for relief against gifts or dispositions of her separate property must be the same as that which is sufficient to defeat similar acts amongst persons in general; such as fraud, surprise, undue influence, &c. (a)

2. In *Grigby v. Cox* (b), it was holden that the wife's concurrence with her husband in a sale of her separate estate, and without the joining of her trustees, could not be impeached, there being no evidence of imposition or undue influence. For as the wife might have appointed the property to her husband, his being a party with her in a sale to a stranger could not vitiate the transaction. In that case the husband covenanted that the estate was free

(a) When a married woman seeks to be relieved against a sale of a reversionary interest in property given for her separate use, on the ground of inadequacy of consideration, the question depends on principles si-

milar to those applied to other sales of expectant rights; on which subject see the cases collected in Appendix No. 4.

(b) 1 Ves. Sen. 517: see also *Essex v. Atkins*, 14 Ves. 542.

from incumbrances; and Lord Hardwicke said that such circumstance made no difference, since the demand of such a covenant from him was but a reasonable request and precaution against a prior secret appointment of the wife, and that the husband alone was the person answerable for a breach of it.

3. So also in *Masters v. Fuller* (a), A (the wife of B, who had agreed to take a house of C at the rent of 20*l.*) having separate property, entered into an agreement without her husband's knowledge, to pay C an additional rent of 18*l.* for the house, in consideration of its being differently fitted up, and which she paid up to her death. A appointed her husband B executor of her will, who filed his bill to be relieved against this agreement of A, charging it to have been a fraud upon A, and obtained by improper means; but which C denied in his answer, and stated that the house was fitted up by A's direction, and according to her fancy, and that both rents formed but a moderate rent in the whole for it. The counsel for B contended that the agreement being concealed from B was a fraud upon him as A's husband, and also upon him as standing in A's place, who would have been relieved against the contract if she had been living. But the Lords Commissioners of the Great Seal thinking otherwise, dismissed the bill, without hearing C's defence.

4. The two following cases seem to establish (notwithstanding the suspicion which attaches to purchasers by trustees from their cestuique trusts (b)), that if the wife sell her separate estate to her trustee, and the transaction be *bonâ fide* and for a proper consideration, the disposition will be valid.

5. In *Davidson v. Gardner* (c), the wife being intitled to

(a) 4 Bro. C. C. 19.

(c) Stated in 1 Sug. V. & P. 230,

(b) *Coles v. Trecothick*, 9 Ves. 10th ed.

234; *Randall v. Errington*, 10 Ves.

423.

a brewhouse to her separate use, vested in a trustee for her, sold it to him for its full value, and no fraud appeared in the transaction. To set aside this sale, the wife filed her bill, but it was dismissed by Lord Hardwicke.

6. In *Parkes v. White*(a), the real estates of Mr. Parkes were limited by settlement to White and his heirs to the use of Mrs. Parkes for life, and to preserve contingent remainders in the usual manner, but in trust to permit her to receive the rents for her separate use for life, remainder to such persons, &c. as she, notwithstanding her coverture, by will, or any writing purporting to be her will, should appoint; and in default of appointment, to the use of an only child absolutely, but if more than one, in trust to sell the premises, and divide the proceeds amongst them, as therein mentioned, with the ultimate limitation, if no issue, to her right heirs. By deeds in May, 1779, Mrs. Parkes and her trustee mortgaged her life estate to A for a debt of her husband; and by other deeds in May, 1785, reciting untruly that she and her husband were intitled to sell the trust estate, White and the legal personal representative of A, the mortgagee, in consideration of the discharge of the mortgage and of 800*l.* paid to Mrs. Parkes and her husband (in the whole 1000*l.*), and at their request and by their direction (who agreed to levy a fine which was afterwards levied) conveyed to Evans, the heir of A, the premises in fee. Mrs. Parkes, in order to complete the title of Evans under her power, made a will, appointing him executor, and devised to him the inheritance of the estate; and for the purpose of preventing any revocation of such will and a new appointment, the husband gave to Evans a bond with a condition to that effect. In August, 1785, White, the trustee, bought the premises of Evans for 1000*l.*; and in 1793 he sold them to Quarman for 1500*l.*, to whom he gave a bond of indemnity against Mrs. Parkes and her husband. In April, 1799, Mr. and

Mrs. Parkes executed another instrument, by which, after acknowledging their receipt from White, the trustee, of 200*l.* stated by him to be the difference of price between Evans's purchase in 1785 and that of Quarman in 1793, after deductions, &c., and that Mrs. Parkes had made a will in favour of Quarman, they engaged that she should not execute another will, nor do any act to molest Quarman, his heirs, &c. At the time of White's purchase, the net rent of the estate was 50*l.* Mrs. Parkes endeavoured to set aside these transactions upon the grounds of her not having received a valuable consideration, and of her being under the control and influence of her husband and White; her bill charging that White had attempted to make undue advantages by taking a conveyance of the trust estate from her; and that Quarman had notice of the settlement, and took a bond of indemnity from White, which notice and bond he admitted in his answer, but claimed the benefit of the purchase as made without fraud, or at least to be allowed the rents received on account of his purchase-money and interest, and to stand as a mortgagee for the residue to the full amount of the principal and interest of all monies White, the trustee, might have advanced for the use or by the direction of the wife. The objects of the suit were, first, to subject the legal estate in the settled property in Quarman to the settlement uses, at least subsequent to the trust for the wife's separate use; and secondly, for a declaration as to her interest (notwithstanding her acts and the remote periods when they were done) that White and Quarman were trustees of the rent during the whole time for her separate use. But as to the wife's separate trust estate for life, let in by levying the fine, Lord Eldon decreed that Quarman was intitled to it on the principle of the wife's right to dispose of it as a feme sole; and that White being a mere trustee to preserve contingent remainders, and to pay the rents to the wife's separate use, was not such a trustee to whom the doctrine

of the Court, in regard to trustees buying trust property, applied. (a) But that as to the limitations in the settlement to the general appointment of the wife after her death by will, and in default of any to her children, his Lordship held, that they were not affected by the transactions, since White being a trustee to protect the ambulatory appointment of the wife and the interests of her children, the transactions could not be supported in breach of those duties, and from what appeared on the face of the instruments. (b) The wills, therefore, were ordered to be delivered up; and Quarman was directed to convey the premises to new trustees to his own use, during the wife's life, with remainder upon the trusts of the settlement, except as to the ultimate reversion, which was to be limited to himself in fee. This ultimate reversion, the reader will have observed, belonged to the wife; and it is presumed that it was excepted in favour of Quarman from the effect of the fine which was levied.

7. In a late case (c), however, a sale from the wife to her trustee under very similar circumstances was altogether set aside. There a sum of long annuities had been bequeathed to trustees upon trust for the separate use of the wife during her life, and after her death, upon trust for such persons as she should by will appoint; and in default, upon trust for the next of kin of the testator. One of the trustees having contracted for the purchase of the wife's interest, a deed was executed whereby the husband and wife absolutely assigned to the trustee their interest in the long annuities. The deed then assumed the form of a will, by which the wife appointed the long annuities absolutely to the trustee. The deed contained a covenant from the husband and wife for quiet enjoyment and for further assurance. It was held that the transaction could not be supported against the wife: Lord Cottenham, C., in giving judgment, said that, assuming that

(a) 11 Ves. 226.

(b) 11 Ves. 231. 235.

(c) *Scott v. Davis*, 4 M. & C.

the wife might be considered as a feme sole as to her life estate in the income arising from the long annuities, she could only be so considered as to so much of the annuities as might be payable after her death to the extent of the power given to her of disposing of them by will, revocable at her pleasure up to the moment of her death. But the attempt had been to enable her to sell this remaining interest in her life-time, and so to use the power given to her by her father's will as to deprive her of the benefit he intended to secure to her. Had that been the only circumstance in the case, he should have felt no difficulty in acting upon it in the absence of authority; but in addition to this, it appeared that all this was done to effect a purchase by the trustee himself at a price admitted to be considerably under the market price of the day; and assuming, which however it was impossible to estimate, that this diminution of price was not more than fairly attributable to the infirmity of the title, it was an actual loss of so much to the married woman. The testator's provisions to secure to his daughter the enjoyment of the whole became, by the act of the trustee, whose duty it was to protect her in such enjoyment, the ground of a sacrifice of a considerable part. The case of *Parkes v. White*, which was not quoted in the argument, was very similar to the present, and many of the observations of Lord Eldon in that case might be adopted in deciding it. There, indeed, the sale of the life estate was supported, because it was a perfectly distinct transaction, but here the whole constituted but one transaction and could not be separated.

8. Where a creditor of the husband procured himself to be appointed a trustee of the wife's separate estate, and then prevailed with her to execute a deed providing for payment of the interest and principal of the debt out of her separate property vested in him as her trustee, the Court under such circumstances set aside the transaction.

The case alluded to is *Dalbiac v. Dalbiac*. (a) There a sum

(a) 16 Ves. 116.

of 65*l.* long annuities, the separate estate of A, the wife of B, was vested in the executors of her surviving trustee. In May, 1796, B and his uncle D procured A to join with him, B, in a bond to D, for B's debt. The executors refused to pay the interest out of A's estate, and D, the creditor, and E were appointed new trustees under a decree obtained for the purpose, and the annuities were transferred into their names. Immediately after this transfer, D, without consulting E, his co-trustee, prevailed upon A to execute a deed, declaring that the new trustees should be possessed of the annuities upon trust to apply them in payment of the interest of the debt, from March preceding the date of the bond, and the surplus to A for life, and after her death to discharge the principal out of the capital fund, which was limited to the wife absolutely in the event of her leaving no child. B the husband being dead, A filed a bill to be relieved against the above securities, and for a transfer of the annuities to herself, there being no child; also for payment of the amount of D's receipts since he became a trustee. D insisted upon the fairness of the transaction, but acknowledged that his consent to become a trustee was with the design of repaying to himself his debt more readily out of A's separate estate. E the co-trustee did not sign the deed. Sir William Grant decreed the securities to be delivered up, because D imposed upon the Court in suppressing his debt for the purpose of being appointed a trustee in order to obtain dominion over the fund, and with it to pay his own debt; that D, therefore, was precluded from setting up such demand against A, and could not be allowed the benefit of the deed obtained under the above circumstances. With respect to D's receipts, his Honour decreed that an account could not be taken farther back than from the husband's death, as he and his wife lived together; and that since she, during his life, would not be intitled to an account against his representative, she was equally precluded against his creditor and assignee. (a)

(a) See *antè*, p. 261., *et seq.*

9. If, however, the wife, with full knowledge of her rights, acquiesce for a length of time in dispositions of her separate property, against which she might originally have obtained redress, the Court will not relieve her. (*a*) This appears from Lord Hardwicke's clear and elaborate judgment in *Pawlet v. Delaval* (*b*), in which case his Lordship decided that Lady Pawlet was concluded by her acts and acquiescence in constituting her separate estate part of the assets of Lord Pawlet, her first husband; and he emphatically observed, that facts and acquiescence were material to determine great rights and properties.

(*a*) *Campbell v. Walker*, 5 Ves. 678.

(*b*) 2 Ves. Sen. 668. On this subject, see *antè*, p. 259. *et seq.*

CHAPTER VII.

OF RESTRAINT UPON THE WIFE'S POWER OF DISPOSING OF
HER SEPARATE PROPERTY BY ANTICIPATION.

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| 1. <i>Restrictions upon anticipation valid.</i>
3. <i>But alienation not prevented by direction to pay fund "from time to time" to her, or "into her proper hands."</i>
6. <i>Anticipation not restrained where intention only inferred.</i>
7. <i>Hovey v. Blakeman.</i>
8. <i>Mr. Roper's remarks thereon.</i>
9. <i>"Receipts of wife alone to be sufficient discharges."</i>
10. <i>Receipts after fund "shall become due."</i>
11. <i>"Not to be sold or mortgaged."</i>
12. <i>Whether, where power and gift in default of appointment, prohibition must extend both to power and gift.</i>
13. <i>Barrymore v. Ellis.</i>
14. <i>Brown v. Bamford.</i> | 16. <i>Harnett v. Macdougall.</i>
17. <i>Moore v. Moore.</i>
18. <i>Baggett v. Meux.</i>
19. <i>Medley v. Horton.</i>
20. <i>Form of proviso to prevent anticipation.</i>
22. <i>Proviso in restraint of anticipation only effectual during coverture.</i>
23. <i>Accordingly wife, when discover, may alien.</i>
24. <i>If she has not aliened when discover, proviso comes into operation on marriage.</i>
25. <i>Tullett v. Armstrong.</i>
26. <i>Rule laid down by Lord Langdale.</i>
27. <i>By Lord Cottenham.</i>
28. <i>But anticipation may be restrained during particular coverture only.</i> |
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1. WHETHER the wife's power of alienating her separate property could be restrained even by express negative words, appears to have been originally doubted, upon the ground of such a restriction being repugnant to the interest which the wife took in the property. However, in Miss Watson's settlement, in which Lord Thurlow was a trustee, the words "and not by anticipation" were by his advice inserted. (a) The clause was afterwards considered by Lord Alvanley (b)

(a) See *Parkes v. White*, 11 Ves. 221; and *Jackson v. Hobhouse*, 2 Mer. 487.

(b) In *Sockett v. Wray*, 4 B. C. C.

to be a valid one, and it was so held by Lord Eldon in the case of *Jackson v. Hobhouse*. (a)

2. In that case 6000*l.* was vested in trustees to permit the wife to receive the interest for life to her separate use, &c., with a proviso against her assigning or otherwise disposing of such interest in any mode of anticipation. The husband and wife assigned the interest to secure an annuity to B, in which C joined as a surety. C, having been obliged to pay some arrears of the annuity, filed a bill against the trustees for reimbursement out of the wife's separate interest, and for the application of the residue in paying C's annuity in future, and for an injunction to restrain the trustees from disposing of the 6000*l.* and interest. This injunction having been obtained, Lord Eldon, upon a motion to dissolve it, said it was too late to contend against the validity of a clause in restraint of anticipation, and he dissolved the injunction. His Lordship also expressed an opinion that if the wife had been guilty of fraud by concealing the clause of restraint, the circumstance could not have improved the situation of the surety in enabling the wife to dispose of her separate interest contrary to the express declaration of the settlor.

3. But a direction that the interest shall be paid from time to time into the proper hands of the wife, is insufficient to prevent her having an absolute disposing power over the income, before the arrival of the periods for her own proper receipts of it. In *Parkes v. White* (b), Lord Eldon considered it to be settled by the authorities, that all the words usually found in limitations to the separate use of married women, as to pay the interest or rents into their own hands, and from time to time, &c., amounted to no more than gifts to their separate use, leaving them at full liberty to dispose of the income as they pleased.

(a) 2 Meriv. 483. The law of Scotland recognises to a certain extent the separate use and restraint against anticipation, *Ritchie v. Rennie*, 9 Jur. 435; *Rennie v. Ritchie*, 12 Cl. & F. 204.
(b) 11 Ves. 222.

4. So, in *Clarke v. Pistor* (*a*), decided at the Rolls in the year 1778, the trust was "to pay the dividends of 2000*l.* bank stock to such persons, &c. and in such manner and form as the wife should from time to time during her life, notwithstanding her coverture, by any note or writing under her hand appoint, and in default of appointment, into her proper hands for her separate use," &c., and after her death to transfer the capital to her husband. Upon the bill of the husband and wife against the trustees, she having made no appointment, the Court, with her consent, ordered a transfer of the fund.

5. This was the case of a voluntary gift by the wife; but several of the decisions arose upon questions between her and her creditors, and they uniformly support her absolute right of alienation, notwithstanding the occurrence of the words "from time to time" in the direction of payment of the interest to her. These cases are *Pybus v. Smith* (*b*), *Witts v. Dawkins* (*c*), and *Brown v. Like*. (*d*)

6. Indeed, the doubt which at first prevailed as to the validity of express declaration that the wife should not dispose of her separate interest by anticipation, affords strong evidence that nothing less will have that effect.

7. There is, however, a case (*e*) which imports a contrary doctrine, and that mere inference of an intention will be sufficient to restrain the wife's power of disposition incident to her separate estate. It therefore requires particular attention. The question in that case arose upon a petition, and for that reason may not have been so fully considered as if it had been discussed upon a bill. The trust was, "to pay the rents and profits, dividends and interest, to arise from the fourth part of a residue, in equal divisions, into the proper hands of the testator's two sisters for their lives to

(*a*) Stated 3 Bro. C. C. 568.

(*d*) 14 Ves. 302: See *Glyn v.*

(*b*) 1 Ves. Jun. 189; 3 Bro. C. C. 340.

Baster, 1 You. & Jer. Eq. Ex. 329.

(*c*) 12 Ves. 501.

(*e*) *Hovey v. Blakeman*, 9 Ves. 524.

their separate uses." Sir William Grant thought that this amounted to a personal bequest to them, to be paid into their respective proper hands, and without a power of disposition, and that an absolute property was not intended to be given to them so as to impart such a power of disposition.

8. Mr. Roper observes upon this case (a), "The limitation was sufficient to vest separate estates in the sisters to which the law, without regard to any intention of the settlor, annexed the *jus disponendi*. There is nothing particular in the trust, it even wants the words 'from time to time,' and merely directs payment of the rents, &c., into the proper hands of the sisters. Such also were the trusts in *Clarke v. Pistor*, *Witts v. Dawkins*, and *Brown v. Like*; yet in those cases it was held that such a direction did not deprive the married women of their equitable rights of disposition. In truth, the direction of payment into the hands of married women for their separate uses is the old method of making such a settlement, and to use Lord Eldon's language in *Parkes v. White* (b), 'these words are only an unfolding of all that is meant in a gift to the separate use' of the wife. And with respect to the settlor's intention, it has been before observed that mere inference of it is insufficient to take away the general power of married women to dispose of their separate property, but that express declaration to that effect is required. That such is the rule was admitted by Lord Eldon in the above case of *Jackson v. Hobhouse*, although its effect might be 'to defeat the intention with which the power was given.' Considering, then, this case to be in opposition to those preceding authorities, and even to the subsequent opinions of Sir William Grant, inferred from his decisions in the more modern cases of *Witts v. Dawkins*, *Brown v. Like*, and in *Sturgis v. Corp* (c), it is presumed that *Hovey v. Blakeman* is a case which would have been

(a) 2 Rop. H. & W. 233.

(c) 13 Ves. 190.

(b) 11 Ves. 222.

differently decided had the question come before the same judge with more solemnity."

9. In the case of *Acton v. White* (a), the trust was for the sole and separate use of the wife for life, so as not to be subject to the debts, control, or engagements of her husband; the trustees were to pay the dividends, interest, and annual produce, as the same should become due and payable, into the hands of the wife, and not otherwise, and the receipts of the wife alone for what should be actually paid into her own proper hands to be sufficient discharges. It was decided that these expressions did not restrain her from disposing of her life interest.

10. But in the late case of *Field v. Evans* (b), where the trustees were directed, during the wife's life, to receive the income of the property, when and as often as the same should become due; and to pay it to such person or persons as she might from time to time appoint, or otherwise to permit her to receive it for her separate use; and it was declared that her receipts, or the receipt of any person or persons to whom she might appoint the same *after it should become due*, should be valid discharges for it, it was held that she was restrained from anticipation.

11. The wife will of course be restrained from alienation by a gift to her separate use, "not to be sold or mortgaged." (c)

12. It has been held by Sir L. Shadwell, V. C. E., that where the wife has a power of appointment over the fund, and there is a gift to her in default of appointment, the prohibition, in order to prevent anticipation, must expressly extend both to the power and to the gift in default of appointment.

13. This was decided in *Barrymore v. Ellis*. (d) There

(a) 1 Sim. & Stu. 429 : see also
Medley v. Horton, 14 Sim. 222; 13
 Law J. N. S. Chan. 442; 8 Jur. 853.
 949.

(b) 15 Sim. 375.

(c) *Steadman v. Poole*, 6 Hare,
 193; 16 Law J. N. S. Chan. 348;
 11 Jur. 449.

(d) 8 Sim. 1.

a fund was vested in trustees, in trust, during the joint lives of the husband and wife, to pay the annuity, as the same should become due and payable, to such person or persons, and for such intents and purposes as the wife should by any writing signed with her own name in her own handwriting, notwithstanding her said coverture, direct or appoint, but not so as to deprive herself of the benefit thereof by sale or other anticipation; and for want of such direction or appointment, to pay the same to her for her own sole, separate, and peculiar use and benefit. Sir L. Shadwell held that the restriction against anticipation applied only to the power, and that, accordingly, an assignment by the wife of the fund was valid. His Honour said that it was a grant to such person or persons as the wife should in a given manner appoint, and subject thereto, to her sole use generally; and if so, that it was competent to her to dispose of the annuity without executing the power. The deed did not say, "Do and shall pay the same into her own hands, &c.," but simply "to her for her own sole use." Then, was that different from a limitation to such uses as A should in a certain manner appoint, and subject thereto, to A generally?

14. In the subsequent case of *Brown v. Bamford* (a), the same construction was given by his Honour to a similar limitation in a will. There a testator gave leaseholds and stock to trustees, upon trust, during the life of his daughter S. B., or until she should be a bankrupt or insolvent, to pay the income to such person or persons, for such intents and purposes, and in such manner as S. B. by any writing or writings under her hand, when and as the same should become due, but not by way of assignment, charge, or other anticipation thereof; should, notwithstanding her then present or any future coverture, direct or appoint, and in default of any such direction or appointment, or so far as the same, if incomplete, should

(a) 11 Sim. 127; 12 Sim. 616; *Bamford* will be found in *The Jurist*, 6 Jur. 451. Some observations vol. 8. pt. 2. pp. 110. 158. 253. upon the doctrine of *Brown v. Bam-*

not extend, into her proper hands, for her sole and separate use, independent of the debts, control, or interference of her then present or any future husband, for which purpose the testator thereby directed that the receipts in writing under the hand of his daughter S. B. should, notwithstanding any such coverture as aforesaid, be good and sufficient discharges for the last-mentioned rents, dividends, and proceeds, or so much thereof as should in such receipts respectively be expressed to have been received. Sir L. Shadwell, V. C. E., said that the words on which the question arose in this case, were the same in substance as the words in *Barrymore v. Ellis*, and that he adhered to his decision in that case, and remarked that there were no negative words in the receipt clause, and therefore there was nothing to restrict the power which Mrs. Bamford had to dispose of or charge the rents and dividends of the trust property under the general direction to pay those rents and dividends to her for her separate use.

On appeal, Lord Lyndhurst, C., at first took the same view of the case as his Honour had done. However, upon the case being reargued, his Lordship reversed the decision (*a*), remarking that the daughter, S. B., was not allowed, by means of any assignment, charge, or any other anticipation, to direct the payment or the application of the rents, &c., by the trustees. But any assignment, charge, or other anticipation, if effectual, would operate as a direction, and this was evidently so considered by the testator or other person who framed the clause; the effect, therefore, of the prohibition was to restrain S. B. from assigning, charging, or in any manner anticipating the income, or exercising any dominion or control over her life estate, unless in the form and under the restriction contained in the power of appointment. She was precluded from assigning, charging, or in any manner anticipating the rents or other income, but she was permitted, when and as they became due, and not before, to direct the

(*a*) 1 Ph. 621; 15 Law J. N. S. Chan. 361; 10 Jur. 447.

application of them, and in default of any such direction, they were to be paid into her own hands. The principle of *Barrymore v. Ellis* had no application to this case, the restriction against anticipation here extending to the whole gift.

15. The principle upon which *Barrymore v. Ellis* was decided does not seem to have met with the approbation of other judges, although they have not directly denied it to be an authority.

16. Thus, in *Harnett v. Macdougall (a)*, a fund was by a marriage settlement vested in trustees, in trust during the life of the wife to pay the dividends to such person or persons, and for such intents and purposes, as she by any writing under her hand, should, notwithstanding her coverture, from time to time, when and as the same should become due, but not by way of assignment, charge, or other anticipation thereof, direct or appoint, and until and in default of such direction or appointment, into her own proper hands, for her own sole and separate benefit, free from the debts, control, or interference of her husband, for which purpose it was declared that the receipts in writing of the wife, or of such appointee as aforesaid, should, notwithstanding her coverture, be good and effectual discharges for the same dividends. The wife, who had become indebted, executed a deed purporting to charge the dividends of the fund. But Lord Langdale, M. R., refused to give effect to the charge, remarking that to do so would be to act in direct contradiction to the plain intention and language of the settlement, which distinctly expressed that the appointment should not be by way of assignment, charge, or other anticipation.

17. In *Moore v. Moore (b)*, a fund was vested in trustees, upon trust, during the joint lives of the husband and wife, to pay the interest and dividends to such persons as the wife

(a) 8 Beav. 187; 14 Law J. N. S. Chan. 173.

(b) 1 Coll. 54; 13 Law J. N. S. Chan. 124; 8 Jur. 139.

should by writing, except in any mode of anticipation, direct or appoint, or in default of such direction or appointment, into her own hands, for her separate use. Sir J. L. K. Bruce, V. C., distinguished the case from those of *Barrymore v. Ellis* and *Brown v. Bamford*, and held that the construction of the deed was, that, until appointment by the wife, the interest should be paid only in the wife's own hands, and she was not to appoint so as to assign or encumber the property prospectively; the effect of which was to restrain her from anticipation altogether.

18. In *Baggett v. Meux* (a), where a testator devised a freehold estate to his daughter A. B., the wife of W. B., in fee, and gave the residue of his estate to trustees upon trust for sale and division among his five children (including A. B.), the shares of the daughters to be for their separate use; and then proceeded as follows; "and I hereby declare that neither of my said daughters shall sell, charge, mortgage, or encumber the estates or property by me given, devised, and bequeathed to them, and that my daughters shall have, receive, and take such estates and property, each of them, for their own sole and separate and respective use and benefit and disposal, and have the sole management thereof, independent of their husbands for the time being, &c.," it was held by Sir J. L. K. Bruce, V. C., that the prohibition against alienation was to be taken in connection with the provision for the separate use, without regard to the order of precedence. The wife accordingly took the estate for her separate use, without power of alienation. This decision has been since affirmed by Lord Lyndhurst, C. (b)

19. The case of *Medley v. Horton* (c), which was decided before *Baggett v. Meux*, does not seem to be consistent with that case, and must be considered as overruled by it.

(a) 1 Coll. 138; 13 Law J. N. S. Chan. 228; 8 Jur. 391.

(c) 14 Sim. 222; 13 Law J. N. S. Chan. 442; 8 Jur. 853. 949.

(b) 1 Ph. 627; 15 Law J. N. S. Chan. 262; 10 Jur. 213.

There a testator directed his trustees during the life of his daughter, to pay a fund to such person or persons as she should appoint, and in default of appointment for her separate use, and he directed that the receipt or receipts of his daughter, or of the person or persons whom she might authorise to receive the same annual proceeds, or any part thereof, should alone be an effectual discharge to his trustees for the payment thereof, and his trustees should always be at liberty to require from his daughter a separate authority or receipt from time to time for each quarterly payment, it being his intention that the annual interest and proceeds should not be charged, sold, or otherwise disposed of. It was held by Sir L. Shadwell, V. C. E., that an assignment by the daughter of her interest was valid on the ground that, there having been an absolute gift, a subsequent declaration that she should not alien was nugatory.

20. In *Brown v. Bamford (a)*, Sir L. Shadwell, V. C. E., observed: "When I was in the habit of drawing conveyances, and wished to settle on a lady property over which she was to have no power of anticipation, I always used to introduce an express proviso that no receipt should be a discharge to the trustees, except a receipt given by the lady for the rents or dividends (according to the nature of the trust property) then actually become due. The proviso to which I have alluded declared, as far as my recollection serves me, that the receipts of the lady under her own hand, to be given from time to time after the rents or dividends should have actually accrued due, should be, *and that no other receipts should be*, effectual discharges to the trustees for the amount of the monies therein expressed to be received."

21. But it is, perhaps, questionable whether anticipation would be effectually prevented by such a proviso (*b*); and it is clear that where words have been previously used sufficient to restrain anticipation, their effect will not be

(a) 11 Sim. 131.

(b) See *Acton v. White*, cited p. 278, *ante*.

destroyed by the absence of negative words in the receipt clause. (a)

22. It is to be observed that clauses restraining anticipation will only operate during coverture. Thus, in a case (b) where personal estate was settled to the separate use of the wife for her life, so that she should not anticipate it, with remainder as she should appoint by will, and, in default of appointment, to her daughter; it was held that, on the death of her husband, she was intitled, with the concurrence of the daughter, to call for a transfer of the principal. Sir Thomas Plumer, M. R., referred to *Brandon v. Robinson* (c) as establishing that the right of alienation is a necessary incident of property. He observed that the power of a feme covert over separate estate, being a creature of equity, equity might modify that power; but this reason only applied during coverture: when the married woman became discoverd, she had the same power over her property as other persons. The attempt to impose upon the power of alienation a fetter, unknown to the common law of England, might be permitted to the extent to which that power was created by equity, but no further.

23. In this case, however, the clause against anticipation was confined to the then existing marriage, so that, of necessity, it determined with the coverture. But in the later cases of *Woodmester v. Walker* (d) and *Brown v. Pocock* (e), where the restraint against anticipation applied to future coverture, it was held that the wife might, whilst discoverd, dispose of the property. The same point had been previously decided by Sir W. Grant, M. R., in the case of *Jones v. Salter*. (f)

24. But if the wife, whilst discoverd, has made no disposition of the property, the clause in restraint of anticipation,

(a) *Harrop v. Howard*, 3 Hare, 626; 14 Law J. N. S. Chan. 82; 9 Jur. 82.

(b) *Barton v. Briscoe*, Jac. 603.

(c) 18 Ves. 429; 1 Rose, 197.

(d) 2 Russ. & M. 197.

(e) 2 Russ. & M. 210.

(f) 2 Russ. & M. 208.

the effect of which was suspended whilst she was discovert, will come into operation upon her marriage.

25. Whether anticipation could be restrained, except during an existing coverture, has been the subject of much discussion. The point directly arose in the cases of *Newton v. Reid* (*a*) and *Brown v. Pocock* (*b*); and it was there held that a clause in restraint of anticipation during a future coverture was inoperative. But these cases have been overruled by the decision of Lord Langdale, M.R., in the case of *Tullett v. Armstrong* (*c*), which has established the validity of clauses against anticipation under such circumstances.

26. In this important case his Lordship, after reviewing the authorities, laid down the following propositions:—

“That property given to a woman for her separate use, independent of any husband, may, in equity, be enjoyed by her during her coverture as her separate estate, although the property originally, or at any subsequent period or periods of time, became vested in her when discovert.

“That in respect of such separate estate, she is by equity considered as a feme sole, although covert. Her faculties as such, and the nature and extent of them, are to be collected from the terms in which the gift is made to her, and will be supported by equity for her protection.

“The words ‘independent of a husband,’ whether expressed or implied in the terms of the gift, mean no more than that equity will not permit the marital power of the husband to be used in contravention of the enjoyment of the property according to the terms of the gift.

“If the gift be made for her sole and separate use, without more, she has during coverture an alienable estate independent of her husband.

(*a*) 4 Sim. 141.

(*b*) 5 Sim. 663: see also *Johnson v. Freeth*, 5 Law J. N. S. Chan. 143: *Malcolm v. O’Callaghan*, 5 Law J. N. S. Chan. 137: and the remarks

of Lord Brougham in *Woodmester v. Walker*, 2 Russ. & M. 207.

(*c*) 1 Beav. 1: *Scarborough v. Borman*, *ibid.* 34.

“ If the gift be made for her sole and separate use, without power to alienate, she has, during the coverture, the present enjoyment of an unalienable estate independent of her husband.

“ In either of these cases she has when discoverd a power of alienation ; the restraint is annexed to the separate estate only, and the separate estate has its existence only during coverture ; whilst the woman is discoverd, the separate estate, whether modified by restraint or not, is suspended, and has no operation, though it is capable of arising upon the happening of a marriage.

“ The restriction cannot be considered distinctly from the separate estate, of which it is only a modification ; to say that the restriction exists, is saying no more than that the separate estate is so modified : the donor in giving the woman, when married, some of the faculties of a feme sole, has withheld the power of alienation ; under the terms of the gift, and by the aid of equity, the woman is a feme sole as to the present enjoyment of the property, but no further ; measuring her faculty by the terms of the gift, she is not a feme sole as to the disposition of her property in anticipation of her intended provision. If there be no separate estate, there can be no such restriction as that which is now under consideration. The separate estate may, and often does exist without the restriction, but the restriction has no independent existence ; when found, it is a modification of the separate estate, and inseparable from it.”

27. This decision was affirmed on appeal by Lord Cottenham, C., who, after an elaborate examination of the authorities, said, that after the most anxious consideration, he had come to the conclusion that the jurisdiction which the Court had assumed in similar cases, justified it in extending it to the protection of the separate estate, with its qualification and restrictions attached to it throughout a subsequent coverture ; and resting such jurisdiction upon the broadest foundation, and that the interests of society

required that this should be done. When the Court first established the separate estate, it violated the laws of property between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a feme sole, the laws of property attached to this new estate, and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property, supported the validity of the prohibition against alienation. (a)

28. But anticipation will not be restrained beyond a particular coverture when the restriction applies only to that case. (b)

(a) 4 M. & C. 377.

(b) Knight v. Knight, 6 Sim. 121.

CHAPTER VIII.

OF PIN-MONEY, AND OF THE WIFE'S CLAIM FOR ARREARS.

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| 1. <i>Pin-money, what.</i>
2. <i>Nature and purpose of.</i>
5. <i>Wife surviving intitled only to one year's arrears.</i>
8. <i>Wife having demanded pin-money, held intitled to all arrears.</i>
10. <i>Not intitled to all arrears though lunatic.</i> | 11. <i>No arrears given where articles for which pin-money allowed provided by husband.</i>
15. <i>Wife's executors not intitled to any arrears, semble.</i>
16. <i>No deduction out of pin-money for alimony, where husband and wife separated.</i> |
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1. A YEARLY allowance settled upon the wife before marriage, for the purchase of clothes or ornaments or otherwise, for her separate expenditure, is generally known by the name of pin-money; as also are gratuitous gifts, or payments from time to time made to the wife by her husband after marriage for such purposes.

2. Pin-money, however, is not to be considered as an absolute gift from the husband to the wife, nor like money set apart for the wife's sole and separate use during the coverture, excluding the *jus mariti*; but as a sum allowed for the wife's personal expenses, and to deck her person suitably to her husband's rank, who has accordingly an interest in its expenditure. (a)

3. This difference between the wife's pin-money and her other separate estate is material to be borne in mind where questions arise as to her claim for arrears of pin-money after her husband's death.

(a) See the remarks of Lord Brougham in *Howard v. Digby*, 8 Bligh, N. R. 269, where the subject of pin-money was much considered.

See also *Jodrell v. Jodrell*, 9 Beav. 45; 15 Law J. N. S. Chan. 17; 9 Jur. 1022.

4. The following propositions appear to be authorised by the cases upon this subject, which, however, do not very distinctly draw the line between pin-money and separate estate.

5. When the wife permits her pin-money to run in arrear for a considerable time, upon surviving her husband she will only be permitted to claim arrears for one year prior to his death. (a)

6. This rule has been adopted by equity, not so much on account of the presumption of satisfaction of the wife's claim by her acquiescence, as to secure the appropriation of the money to the purpose for which it was intended. (b)

7. In an early case, however (c), where at the time of the husband's death there was an arrear of one year and three-quarters of pin-money due to the wife, the Court allowed it to her. And it has been laid down by Lord Hardwicke (d), that where the wife lives separate from her husband, and without any allowance, she will be intitled to all arrears due at her husband's death. But these cases would probably not be held to be authorities at the present day. (e)

8. Where it appeared that the wife had demanded her pin-money without success, she was held to be intitled to all arrears due at her husband's death. (f)

9. The case of *Brodie v. Barry* (g) has been cited as an authority that when the wife is *non sanæ memoriæ*, and therefore incapable of consenting or waiving her right, she is intitled to her full arrears.

10. But *Brodie v. Barry* was not a case of pin-money, and

(a) *Aston v. Aston*, 1 Ves. Sen. 267: *Townshend v. Wyndham*, 2 Ves. Sen. 7: *Peacock v. Monk*, 2 Ves. Sen. 290: *Offley v. Offley*, Pre. Ch. 26.

(b) *Howard v. Digby*, 8 Bligh, N. R. 269.

(c) *Warwick v. Edwards*, 1 Eq. Ab. 140.

(d) *Aston v. Aston*, 1 Ves. Sen. 267.

(e) See *Howard v. Digby*, *ubi sup.*

(f) *Ridout v. Lewis*, 1 Atk. 269.

(g) 2 Ves. & B. 36.

it has been since decided in the case of *Howard v. Digby* (a), that the wife would not be intitled under such circumstances. There the Duchess of Norfolk became a lunatic in 1782, and continued so until the time of her death in 1820. Her husband, the Duke of Norfolk, died in 1815, having, during the time of his wife's lunacy, maintained her, and during several years kept a separate establishment for her. A bill having been filed by her executors against the executors of the Duke, claiming arrears of pin-money from 1782 to the death of the Duke, it was held that the claim was not maintainable by the executors, and would not have been maintainable by the Duchess herself, if she had been living.

11. Where the provision is expressed to be made for particular purposes, as for the wife's apparel or private expenses, and they are provided for by the husband, this circumstance will bar the wife from claiming any arrears of her pin-money, which otherwise might be due at the decease of her husband; for this will be considered a payment or satisfaction by the husband. (b)

12. Thus, in *Powell v. Hankey* (c), Lord Macclesfield said that if there be a provision for the wife's separate use for clothes, and her husband provide them for her, her claim to the provision will be barred.

13. So also in *Thomas v. Bennet* (d), pin-money was secured to the wife by settlement before marriage, for her apparel and private expenses: the wife survived her husband and died; then her executors claimed 500*l.* for ten years' arrears of the provision, but it appearing that the husband maintained her, and there being no evidence that she had ever demanded the pin-money, the claim was disallowed.

14. Again, in *Fowler v. Fowler* (e), Lord Talbot said that

(a) 8 Bligh, N. R. 269.

(b) 3 P. W. 355: *Howard v. Digby*, 8 Bligh, N. R. 209.

(c) 2 P. W. 84.

(d) 2 P. W. 341.

(e) 3 P. W. 355. This case

turned upon the doctrine of the satisfaction of a debt by a legacy. The husband, in consideration of the then intended marriage, and of the wife's portion, settled 100*l.* a year upon her for pin-money. Two years' arrears

where pin-money was secured to the wife, and it appeared that the husband, nevertheless, provided her with clothes and other necessaries, that circumstance, during the time that she was so provided for, would be a bar to any demand for arrears of pin-money.

15. It seems to follow from the nature and purpose of pin-money, that the wife's executors have no claim against the husband or his estate even for one year's arrears. (b)

16. Where the wife is intitled to pin-money, and she is separated from her husband, no deduction will be made out of her pin-money for alimony, because she would have been intitled to maintenance beyond the pin-money, if she and her husband had lived together. (c)

became due, and then the husband gave her a legacy of 500*l*. After the making of the will another year's arrears became due, and then he died. And Lord Talbot decided, that the legacy of 500*l*. was a satisfaction of the two years' arrears, because of larger amount than the debt, upon the general rule which is established in such cases; and that the creditor and legatee being a wife made no difference. But his lordship held that the bequest could not be a satisfaction of the one year's

arrears, since that was a debt not contracted at the date of the will, and might possibly have never become due. For the distinctions which have been established as to when a legacy shall and shall not be a satisfaction of a debt, see Roper & White upon Legacies, vol. 2. chap. 16.

(b) *Howard v. Digby*, 8 Bligh, N. R. 271.

(c) *Ball v. Coutts*, 1 Ves. & B. 305.

CHAPTER IX.

OF THE WIFE'S SEPARATE TRADING UNDER HER HUSBAND'S AGREEMENT, AND OF HER POWER TO DISPOSE OF SAVINGS OUT OF ALLOWANCES MADE TO HER BY HER HUSBAND.

SECTION I.

OF HER SEPARATE TRADING UNDER HER HUSBAND'S AGREEMENT.

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| <p>2. <i>Where agreement valid against creditors.</i></p> <p>3. <i>Where property vested in trustees before marriage, wife may at law carry on trade as agent of trustees.</i></p> <p>4. <i>Stock in trade will not be vested in husband or his assignees in bankruptcy.</i></p> <p>5. <i>Jarman v. Wolloton.</i></p> <p>7. <i>Effect of husband's covenant with trustees that wife shall dispose of goods.</i></p> <p>9. <i>Wife trading cannot negotiate securities in her own name.</i></p> <p>10. <i>But may use husband's name, semble.</i></p> <p>11. <i>Barlow v. Bishop.</i></p> <p>12. <i>Effect in equity of securities given in wife's name.</i></p> | <p>13. <i>Husband, by agreement after marriage permitting wife to carry on trade, liable at law.</i></p> <p>14. <i>Intitled at law to profits.</i></p> <p>15. <i>Wife intitled in equity to profits where agreement before marriage.</i></p> <p>16. <i>And where agreement after marriage, if sufficient evidence of agreement.</i></p> <p>17. <i>Effect where husband deserts wife, and she carries on separate trade.</i></p> <p>18. <i>Mr. Jacob's remarks.</i></p> <p>20. <i>Husband liable if no trustees.</i></p> <p>21. <i>Not liable where trustees.</i></p> <p>22. <i>Extent of liability of husband or trustee.</i></p> <p>23. <i>Wife trading under such agreement cannot be bankrupt.</i></p> |
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1. INDEPENDENTLY of the acquirement by the wife of separate property by the means before mentioned, she may do so by carrying on trade on her own separate account, apart from and without the interference of her husband. Her character as a feme sole trader under the custom of London has been

before discussed. (a) Her ability to carry on such business on her own individual account, now to be considered, does not arise from any particular custom, but in consequence of express agreement between her and her husband before marriage, or from his subsequent permission.

2. When the agreement is made previously to the marriage, since the consideration is valuable, the transaction will not only be obligatory upon the husband, but also binding upon his creditors. When the agreement originates during the marriage, it will be void against his creditors but good against himself, for the reasons mentioned in a preceding part of this work, which treats of the validity of settlements made before and after marriage. (b)

3. Upon the abstract question of the legal power of the wife to carry on trade upon her separate account during the marriage, Lord Mansfield has observed (c), "that whether by any means a man might before marriage put his intended wife in a situation to carry on a separate trade, there was no authority that he might not do so." If, then, property be vested in trustees before marriage, to enable the wife to carry on business upon her sole account and for her separate use, the disability of coverture will be so far removed, that the transaction will be established against the husband and his creditors, and the separate character of the wife as a feme sole will be acknowledged; and for the reasons mentioned in the case next stated, it is unnecessary that the assigned articles should be enumerated or specified in a schedule annexed to the settlement, if they can be otherwise identified. In such a case, the trustee of the wife will be intitled to the property assigned, and to its increase and profits, for her sole and separate use and benefit. The law considers the wife as the agent of her own trustee, and her possession as his possession.

(a) *Suprà*, p. 76. *et seq.*

(c) 3 Term Rep. 620, *in notis.*

(b) See *suprà*, book 2. chapters
1 & 2.

4. Upon the application of these principles, the goods assigned and in the possession of the wife will be protected for her, and excepted out of the general rule of the common law, according to which a married woman can have no property during the coverture, but all her estate is vested in her husband: and upon the same principles, the goods assigned and in the possession of the wife will be protected against the operation of the statute of George the Fourth (*a*), which vests in the husband's assignees in bankruptcy all such personal estate as at the time of his becoming a bankrupt should by the consent of the true owner be in the bankrupt's possession, order, and disposition, or of which he should be the reputed owner, and take upon himself the sale, alteration, or disposition as owner, &c.

5. Thus, in *Jarman v. Wolloton* (*b*) (which occurred when the statute of James the First (*c*), which contained a similar provision, was in operation), by a settlement before marriage, reciting an agreement that the wife's stock in trade, book debts, &c. should be assigned to a trustee for her separate use and disposal, to the intent that she might carry on her trade at her own risk and charges, and for her own separate and exclusive benefit, she assigned to A all her stock in trade and other effects at, in, or about C, and all book and other debts then or afterwards to become due to her in the course of her business (of a milliner), and all other her moneys and effects in her trade, in trust for her separate use. There was not any schedule of the property annexed to the deed, or referred to; but of the furniture and some of the articles an inventory was kept by the trustee. For some time after the marriage, the wife carried on her trade separately, and in a different house from her husband; but

(*a*) 6 Geo. 4. c. 16. sect. 72.

(*b*) 3 Term Rep. 618: see *ex parte* Martin, 2 Rose, 381; 19 Ves. 491: *ex parte* Horwood, Mont. & M'Ar. 169: *ex parte* Massey, 2 Mont. &

Ayr. 173: *ex parte* Elliston, 1 Mont. & Ayr. 365.

(*c*) 21 Jac. 1. c. 19. sect. 11, repealed by the 6 Geo. 4. c. 16.

latterly all her effects were removed to his house, and she carried on her business in a separate apartment. The husband paid the rent of the house, and was at the expense of fitting up the shop. The husband having become a bankrupt, the trustee brought an action of trover for recovery of goods and furniture, which he claimed under the settlement for the separate use of the wife; but the jury found that the wife's business was not carried on separately from her husband, and therefore gave a verdict for the assignees as to the stock in trade, and a verdict for the trustee for the furniture. The latter of these verdicts having been unsatisfactory to the assignees, a new trial was moved for, upon the grounds that either the trust deed did not protect the property, or that the assignees were intitled to retain the possession under the statute of James the First. As to the first, the Court decided that the deed was valid, the husband and wife being parties to it, and that it protected the goods, &c. comprised in it for the wife's separate use; also, that the want of a schedule to the deed specifying the property assigned was immaterial, for it would have given no public notice or information, and it would have been only known to the persons interested in the settlement. As to the second point, the Court said, that the husband had not the order and disposition of the property with the consent of the real owner, to make the case fall within the statute; for the trustee was the legal owner, who never consented, and the wife's possession of the goods was as agent of such trustee. The Court therefore refused to grant a new trial.

6. In the above case, the authority of *Haselinton v. Gill* (a) was recognised, in which Lord Mansfield said, that wherever such a trust could be supported in equity, the trustee would be intitled in a Court of Law. That was a case of the assignment to trustees for the separate use of the wife by a settlement before marriage of a number of her cows,

(a) 3 Term Rep. 620, *in notis*: *Dean v. Brown*, 5 B. & C. 336.

&c., and of the increase and produce from them. Some of the cows, and of their increase, were taken in execution for the husband's debt, for which cows, &c. an action of trover was brought by the trustees, who recovered in the action not only the value of the cows, but of their increase. And with respect to the latter, Buller, J., said, it was the same as if the wife had paid the produce arising from the original cows to the trustees, and they had purchased the other cows, for she acted as the agent of her trustees. But Lord Mansfield observed "that if the husband had carried on the trade in his own name, and contracted debts in it, that would have varied the case."

7. Where in an antenuptial settlement, reciting that the intended wife was possessed of certain goods, and that it had been agreed that in case she survived him, she should have the goods, and such articles as might be bought in lieu thereof for her own use, and in case she should die before him, that she might dispose of the goods, the husband covenanted with trustees that he would not dispose of the goods without the consent of his wife, that he would purchase new articles in lieu of those which might be worn out or disposed of; that if she survived him she should have the goods to her own use, and if he survived her she should dispose of them subject to his life interest, it was held that the husband's covenant did not constitute him a trustee, and that at law the goods were the property of the husband, and might be seized under an execution against him. (a)

8. In the above cases, we have seen upon what principle it is that a Court of Law by circuitry changes in effect the character of wife into that of a single woman. That principle, however, does not apply even to transactions connected with the business, when the wife gives, negotiates, or takes securities in her own name; for, as it has been before observed, the common law vests all her personal estate in her

(a) *Izod v. Lamb*, 1 Crompt. & J. 35.

husband; and the mode by which that is evaded by modern legal decisions in consistency with the rule, is by considering the wife as the agent of the trustee.

9. But that construction cannot be made against actual expression to the contrary. Accordingly, if she give, negotiate, or accept securities for money in business in her own name, whether her separate trading be in consequence of such or the like settlements before marriage, as above noticed, or with the husband's consent after marriage, the securities given or negotiated will be void (*a*), and over those taken by her the husband will have the same rights as over her other negotiable instruments. (*b*)

10. But if she use the name of her husband in these transactions, then probably they would be supported at law upon the presumption made in several other instances (*c*), of her having acted under authority from him.

11. In *Barlow v. Bishop* (*d*), a promissory note was made payable to or to the order of Ann Parry (a married woman), who carried on business as a sole trader with the consent of her husband. The note was made payable to her in the course of her trade, and she indorsed it for value in her own name. The indorsee was not permitted to recover the amount of the note against the maker, on the ground that by the first delivery of the note it became vested in the husband (*e*), and she could not by indorsement in her own name transfer such interest; but Lord Kenyon said, that since the husband permitted her to carry on business on her own account, and the transaction of the note was in the course of the trade, if the wife had indorsed it in her husband's name, his Lordship was not prepared to have said, that that would not have availed, as many acts of that nature might be done by a power of attorney, and a jury might have presumed what

(*a*) *Antà*, p. 41.

(*b*) See *suprà*, vol. I. p. 38.

(*c*) *Antà*, p. 42.

(*d*) 1 East, 432; 3 Esp. 266: see *Cotes v. Davies*, 1 Campb. 485.

(*e*) As to this point, see *suprà*, vol. I. p. 38.

was necessary in favour of an authority from her husband for the purpose.

12. And it seems that, in equity, securities given by or to the wife in her own name, for a debt which she is allowed to contract in respect of her separate property or separate business, will be established against herself in respect of such property, upon the principle of her power of acting as a feme sole, and her absolute dominion over such separate estate and concerns.

13. It may be inferred from the above opinion of Lord Kenyon, and what appears in prior parts of this work in regard to presumptions, that, at law, if the husband, by agreement after marriage, permit his wife to carry on business as a feme sole, her transactions in it with strangers will bind him, upon his presumed authority to her to do all necessary and proper acts for the purpose of carrying it on, except when that presumption cannot be raised for such or the like reasons as mentioned in *Barlow v. Bishop*.

14. But at law the profits are the husband's, there being no trustees, no obstacle to interpose between the rule of law, which vests in him all the wife's personal property accruing to her during the marriage, and her equitable title to it as her separate estate under the permission of her husband. (a)

15. Since, however, as has been shown, a Court of Equity will make the husband a trustee for her separate use; if the husband merely agree, in articles before the marriage, that his wife shall carry on business on her own sole account, all that she earns in the trade will in equity be her separate property, and be applicable and disposable by her as such, subject to the demands affecting it.

16. And it would seem that Equity would give the same effect to such an agreement by the husband after marriage, if it is established by sufficient evidence. (b)

(a) See *Saville v. Sweeny*, 4 B. & Ad. 514; 1 Nev. & M. 255.

(b) See *suprà*, vol. I. p. 33, and p. 304. *infra*.

17. In a case (*a*) where the husband deserted the wife, and she by the aid of her friends carried on a separate trade for her support, she was held intitled to her earnings.

There A, the daughter of B, married C, who deserted her with two infant children, and went abroad, and was absent for fourteen years. B, the mother, intrusted her with a stock of goods, proper for the business of a milliner and broker, and permitted her to take the profits for the maintenance of herself and children. B, in the division of her property, assigned to her son D personal estate, desiring him to assist A, by lending her such of the said goods as were necessary to enable her to support herself and family; B also assigned to her grand-daughter E, the daughter of A, the residue of her property. A saved 20*l.* out of her separate trading, which she lent upon bond, and afterwards a like sum upon a promissory note, both of which were, contrary to her knowledge at the time, made payable to C, her husband. C, upon his return from abroad, possessed himself of the goods lent to A to trade with, and the produce of the stock, for the redelivery of which, and payment of principal and interest on the bond and note, the bill was filed by the wife, &c. And Sir Joseph Jekyll said, that in consequence of the husband's desertion of his wife, the Court would consider the property acquired by her during his absence, to subsist herself and family, as her separate property, and not at the disposal of her husband. He therefore declared, that A was intitled to the goods which were in her possession, and to the stock in her separate trade for her separate use; also, that she was intitled to the bond and note, and decreed accordingly.

18. Upon this case Mr. Jacob remarks (*b*), "It will be observed, that in this case the goods with which the wife carried on her separate trade had been assigned by the mother to her son, with a direction that they should be lent

(*a*) *Cecil v. Juxon*, 1 Atk. 278.

(*b*) 2 Rep. H. & W. 173 *n.*

to the wife for the support of herself and family: a direction which did not give her the legal property, but which might reasonably be considered as a trust for her separate use. It seems to have been taken for granted in *Lamphir v. Creed*, that the circumstance of the husband absenting himself or permitting her to trade separately, would not alone divest him of his interest in property acquired by her." (a)

19. *Lamphir v. Creed* (b) was to this effect: A, the wife of B, (a soldier in a militia regiment, and residing with his regiment in a part of the kingdom at a distance from his wife), employed the plaintiff C to purchase a sixteenth share of a lottery ticket, in which she agreed that C should be equally interested with her. At this time A carried on the business of a greengrocer apart from her husband, but there was no evidence of any assent of her husband to her separately carrying on this trade for her own use, except what could be inferred from his separate residence. The ticket was drawn a prize, and A refusing to permit C to participate in the good fortune, C instituted the present suit to accomplish that object; but Sir William Grant dismissed the bill, observing, that the purchase-money of the ticket was the husband's, that the wife was incompetent to pass his interest in any part of its profits or produce, or to bind him by any contracts in regard to such his property, except those which were incident to the trade; and that as the purchase-money was the husband's so must be what it yielded, so that the plaintiff's title was defective.

20. With respect to the husband's liability to the debts contracted by the wife in her separate trade, it seems that the husband is liable at law (as was intimated by Lord Kenyon, in the case of *Barlow v. Bishop*, before stated (c))

(a) See p. 304. *infra*.

(b) 8 Ves. 599. This case, as stated, consists of what appears from the report, and from a MS. in the

possession of Mr. Belt.—*Note by Mr. Roper.*

(c) *Suprà*, p. 297.

for the wife's debts in trade carried on by her with his permission, without the intervention of trustees, upon the presumption of her agency for him.

21. But when the property is legally vested in trustees to enable the wife to carry on trade for her sole and separate use, it is presumed that the husband is absolved from all responsibility for her debts contracted in it, upon the presumption by which the law renders the husband liable in the instance before mentioned; for in such case the wife is the agent, not of the husband, but of the trustee; the debts, therefore, are those of the trustee, and since he is legally intitled to the profits, he is legally responsible for the debts of his agent (the wife), incurred in conducting it.

22. Mr. Roper seems to have considered (*a*) that in the above cases the husband or trustee would be protected in equity, and the creditors confined to the assets in the trade; but, as Mr. Jacob observes (*b*), "if the trustee or husband of a married woman, who carries on a separate trade, have, by permitting or sanctioning it, rendered themselves responsible at law for her debts, there seems to be no principle upon which a Court of Equity can relieve them from this liability as against the creditors. A trustee or executor, who, in the due execution of his trusts, carries on a trade for the benefit of his cestuique trusts, is not relieved from the personal responsibility which he incurs. (*c*)"

23. It is now settled that no action can be maintained against a married woman. Since, therefore, no legal demand can be established against her, it seems that she cannot be made a bankrupt as a separate trader, notwithstanding Lord Apsley's decision in *ex parte* Preston (*d*), for this case differs from that of a feme sole trader in the city of London, the custom of which, as we have before seen (*e*),

(*a*) 2 Röp. H. & W. 175.

(*b*) Ibid. 175 n.

(*c*) 10 Ves. 120: 1 Buck, 209.

(*d*) Green, 8: see *ex parte* Mear,

2 Bro. C. C. 266.

(*e*) *Antz*, p. 76, *et seq.*

placing the wife at law in the situation of a single woman, enables her to make valid legal contracts, &c., and subjects her personally to answer for them.

SECTION II.

OF THE WIFE'S POWER TO DISPOSE OF SAVINGS OUT OF ALLOWANCES MADE TO HER BY HER HUSBAND.

2. *Sir Paul Neal's case.*

3. *Slanning v. Style.*

6. *Mr. Jacob's remarks.*

1. WHERE the husband permits the wife to have and make profit of certain articles of his property, either for her own use, or in consideration of her supplying the family with particular kinds of necessities, or when he makes to her a yearly allowance for the keeping of his house, the profits in the first case, and the savings in the other, have in equity been considered as the wife's own separate estate, although at law, upon the principle that all the personal property which a married woman acquires is that of her husband, they belong to him.

2. Thus, in Sir Paul Neal's case (*a*), it was decreed, that if a woman have pin-money or a separate maintenance settled upon her, and by management or good housewifery she save money out of it, she may dispose of the savings, or any jewels, &c. bought with them, by writing in nature of a will, if she die before her husband; or if she be the survivor, then it was said that the money shall be her own, and not be liable to her husband's debts.

3. A leading case upon this subject is *Slanning v. Style*. (*b*)

(*a*) Cited in *Herbert v. Herbert*,
Pre. Ch. 44.

(*b*) 3 P. W. 337.

It appeared that the husband allowed his first wife to dispose and make profit of all such butter, eggs, poultry, pigs, fruit, and other trivial matters, which arose from his farm, and beyond what was used in the family, for her own separate use; and which allowance he called her pin-money. From her death, until he married the defendant Style, his sister kept his house, and had the same allowance, which was continued to the defendant, the second wife, as pin-money. It was in proof, that whenever any person came to buy any fowls, pigs, &c., the husband said he had nothing to do with those things, which were his wife's; and it further appeared in evidence, that he confessed that he, having been making a purchase of about 1000*l.* value, and being in want of money, had been obliged to borrow 100*l.* from his wife to make up the purchase-money. The husband being dead, his widow claimed the 100*l.* out of his estate. And Lord Talbot decreed that she should be a creditor for such sum, observing, that the money being the wife's savings, and the husband's agreement having been proved, it was but a reasonable encouragement to her frugality, and that such agreement would be of little avail, if it were to determine with his death; that it was the strongest proof of the husband's consent, that the wife should have a separate property in the money arising by the savings, in that he applied to and prevailed with her to lend him the 100*l.*; for he did not claim it as his own, but submitted to borrow it as her money. Therefore, and especially as there was no creditor of the husband to contend with, his Lordship decreed as above.

4. In *Calmady v. Calmady* (*a*), referred to in the above case, the husband agreed with his wife, that upon every renewal of a lease by him she should receive from the tenant two guineas, and that sum was allowed to be her separate money.

5. So, also, in *Mangey v. Hungerford* (*b*), the wife, as it

(*a*) 11 Vin. Abr. 181, 21.

(*b*) 2 Eq. Ca. Abr. 156, in marg.

appeared, had saved a considerable sum of money out of housekeeping, and in a suit instituted against her for a discovery of what she had saved, she insisted by answer that she was not bound to make such a discovery; and upon exceptions to the answer, it was held sufficient by Lord King.

6. "But," as Mr. Jacob remarks (*a*), "these cases, in which the wife has been considered to have a separate property in her savings out of a voluntary allowance from her husband, are shaken by later authorities, which have laid down the principle, that the wife cannot acquire separate property from her husband, except by a clear irrevocable gift, either to some person as a trustee, or by some clear and distinct act of his, by which he divests himself of the property, engaging to hold it as a trustee for the separate use of his wife. (*b*) In Tyrrell's case (*c*), where the question was as to the wife's right to jewels, stated to have been bought out of a yearly sum allowed by her husband for her expenses during cohabitation; the Lord Keeper thought that would make no difference, that if the wife saved anything out of such allowance, it belonged to the husband."

(*a*) 2 Rop. H. & W. 140 *n*.

(*c*) 1 Freem. 304.

(*b*) 5 Ves. 79: see *Walter v. Hodge*, 2 Swan. 92; cited *suprà*, vol. I. p. 33.

BOOK THE FOURTH.

OF SEPARATION BETWEEN HUSBAND AND WIFE.

CHAPTER I.

WHAT DEEDS PROVIDING FOR SEPARATION WILL BE VALID.

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| <p>7. <i>Anomalies introduced by doctrine of separation by agreement.</i></p> <p>8. <i>Mr. Jacob's remarks.</i></p> <p>9, 15. <i>Whether deed providing for future separation will be enforced.</i></p> | <p>10. <i>Hoare v. Hoare.</i></p> <p>11. <i>Mr. Roper's remarks.</i></p> <p>12. <i>Durant v. Titley.</i></p> <p>16. <i>Rodney v. Chambers: deed providing for future separation with consent of trustees.</i></p> <p>17. <i>Mr. Jacob's remarks thereon.</i></p> |
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1. THE last subject for our consideration is the effect of the dissolution or suspension of the marriage state by divorce or by voluntary separation of husband and wife.

2. Where a marriage is voidable on any of the grounds which have been noticed in a previous part of this treatise (a), a *divorce à vinculo matrimonii* may, during the life of the parties, be obtained from the Ecclesiastical Court.

3. But when a valid marriage has once been contracted, it is, according to the law of this country, indissoluble. The Legislature, however, has of late years frequently granted divorces *à vinculo matrimonii* where one of the parties has been guilty of adultery.

4. A partial divorce, usually called a divorce *à mensâ et thoro*, will, in cases of adultery or cruelty, be granted by the Ecclesiastical Courts. (b)

(a) *Suprà*, Vol. I. pp. 6, 7.

(b) See Poynter on Mar. and Div. p. 184.

5. A partial divorce may also take place by the mutual agreement of the parties. This species of divorce is the offspring of late years. It was unknown to the common law; and the Ecclesiastical Courts, which had the exclusive jurisdiction of the rights and duties arising from marriage, did not permit the parties by agreement between themselves to destroy the duties and obligations of that important contract.

6. This branch of the subject requiring to be more fully considered than the others, we will, before noticing the points relating to the other kinds of divorce which fall within the province of this treatise, direct our attention to the doctrine and validity of separation deeds, the mode by which a voluntary separation between husband and wife is carried into effect.

7. The perplexities occasioned by the establishment of the doctrine in courts of law and equity, that a separation *in pais* is in effect valid, are noticed by Mr. Roper (*a*), and are detailed in Lord Eldon's judgment in the case of *St. John v. Lady St. John* (*b*); and in the case of the *Earl of Westmeath v. The Countess of Westmeath* (*c*), which came before Lord Eldon on a motion for an injunction to stay proceedings at law under a deed of separation, his Lordship expressed a strong opinion against the policy of such instruments, and against the principle of the cases in which they had been held valid, the injunction being refused on the ground that the matter depended upon a legal question.

8. "However," as Mr. Jacob observes (*d*), "the case of *Marshall v. Rutton* (*e*), in deciding that a deed of separation does not relieve the wife from the legal disabilities of coverture, and the case of *Legard v. Johnson* (*f*), in deciding that

(*a*) 2 Rop. H. & W. 267.

(*b*) 11 Ves. Jun. 529.

(*c*) Jac. 126. See also the opinions of Lord Eldon in the same case in the House of Lords, 1 Dow & Cl. 544; and *Westmeath v. Salisbury*, 5 Bligh, N. R. 398.

(*d*) A discussion by Mr. Jacob of the objections to the legality of deeds of separation will be found in the Appendix, No. 12.

(*e*) 8 T. R. 545.

(*f*) 3 Ves. 352.

an agreement for a separate provision between the husband and wife alone is void, from her incapacity to contract, have removed the chief part, if not the whole, of the anomalies introduced by the previous cases on this subject. These decisions have materially qualified the effect of deeds of separation. It may be considered at present as settled, that such deeds, when not contemplating a future separation, are valid, so far as relates to the trusts and covenants by which the husband makes a provision for the wife, and the indemnity given to the husband by the trustees. (*a*)”

9. But it is questionable whether a deed providing for a future separation will be enforced either at law or in equity. In some early cases, however, such deeds have been held to be valid.

10. Thus, in the case of *Hoare v. Hoare* (*b*), which was decided by the House of Lords in Ireland before the union, the wife was intitled for life to two annuities amounting to 400*l.*, which before her marriage were vested in trustees, upon trust that if a separation should afterwards take place between her and her future husband at her instance, the trustees should permit her to take to her separate use a moiety of the annuities of 400*l.* during such separation, and should permit her husband to receive the other moiety; but that if a separation took place by his means, or at his instance, then that she should receive the whole of the 400*l.* annuities for her separate use during the marriage. It seems that a separation took place in consequence of the cruelty and misconduct of the husband; and a bill was filed by the wife in the Court of Chancery in Ireland to enjoin the husband from intermeddling with the annuities, and to restrain

(*a*) See 8 T. R. 521: 2 Ventr. 730; *S. C. Jones v. Waite*, 5 Bing. 217; *Leech v. Beer*, 3 Keb. 363: N. C. 34; 7 Scott, 317; 9 CL & Fin. 2 B. C. C. 90: 3 Mer. 256: *Bate-* 101; 4 Man. & G. 1104; 5 Scott, *man v. Ross*, 1 Dow, 235: *Jee v.* N. R. 951; 6 Jur. 653.
Thurlow, 2 B. & C. 547: *Innell v.* (*b*) 2 Ridgeway's Parl. Ca. in
Newman, 4 B. & Ald. 419: *Waite v.* Ireland, 268.
Jones, 1 Bing. N. C. 656; 1 Scott

the trustees from paying any part of them to him; and praying that the trustees might pay the whole of the annuities to the wife under the above provision in the settlement, and for a receiver. The husband stated in his answer, that he had always used his wife with tenderness and affection, and he offered to take her back, and to treat her as his wife. Upon the evidence, and the pleadings, the Court ordered a moiety of the annuities to be paid to her until cohabitation or further order, to commence from the time of the separation. The wife being dissatisfied with this decree, appealed from it to the then House of Lords in that country, claiming the whole of the annuities under the above settlement. All objections as to the jurisdiction of the Ecclesiastical Court, and in relation to the immorality and illegality of the agreement, were urged, and moreover that it was an agreement for a divorce instead of a marriage; and it was further contended that the husband having judicially offered to take his wife back again, had determined the separation. But the House of Lords was not moved by these arguments. It varied the decree, and ordered the whole of the annuities to be paid to the wife until she and her husband should cohabit, or till the further order of the Court below.

11. Mr. Roper remarks (*a*), "It may be inferred from Lord Hardwicke's judgment in *Moore v. Moore* (*b*), that he considered such an agreement *in prospectu* to be valid; and a like inference may be drawn from Lord Vane's case (*c*), in which, a separation having taken place, the husband and wife agreed to cohabit; and by articles entered into on that occasion, he covenanted, that if she desired to live apart he would not molest her. After these articles were concluded, cohabitation took place, but, in consequence of ill treatment, the husband and wife separated a second time, and she

(*a*) 2 Rep. H. & W. 280.

(*c*) Stated 13 East, 171, *in notis*;

(*b*) 1 Atk. 277, stated *suprà*, p. 2 Strange, 1202.

135: see also *Nicholls v. Danvers*, 2

Vern. 671.

having exhibited articles of the peace against him, the Court considered that, under the circumstances, and the agreement providing such future possible separation as above (the validity of which was not questioned), the wife was intitled to security."

12. But these decisions must be considered as overruled by the case of *Durant v. Titley*.(a) There, in a deed of separation between the husband and wife (reciting subsisting differences), the husband covenanted with a trustee to pay him an annuity of 500*l.* during the joint lives of himself and his wife in case she should live separate and apart from her husband, and should take one of her children by her said husband to live with her. The husband pleaded to a declaration on this covenant, that after the making of the said indenture his said wife cohabited with him for seven years, and that afterwards, without his consent, and against his will, she quitted and left him, and ceased to cohabit with him; and to this plea the plaintiff demurred. The Court of Exchequer having given judgment for the plaintiff, the defendant brought a writ of error, and one of the grounds on which it was contended that the action could not be supported, was, that the deed being made in contemplation of a future separation of a husband and wife at the pleasure of the wife, it was contrary to the policy of marriage, and void in law. The Court of Error reversed the judgment.

13. The authority of this case was recognised in *Hindley v. Westmeath*.(b) And in a late case(c), where the husband covenanted in marriage articles to settle an annuity upon his wife, the first payment to commence on the first quarter-day after his death, or on any separation taking place between them, the husband having ceased to cohabit with

(a) 7 Price, 577.

(c) *Cocksedge v. Cocksedge*, 14

(b) 6 B. & C. 200; 9 Dow. & Ry. Sim. 244; 13 Law J. N. S. Chan. 351: see *ex parte* Draycott, in re Archer, 2 Glyn & J. 283.

the wife, and a bill having been filed for the purpose of having the articles specifically performed, Sir L. Shadwell, V. C. E., refused to interfere.

14. And a deed has been held to be void which in terms provided for an immediate separation, but which in reality meant to provide for a future separation. (*a*)

15. However, in *Vandergucht v. De Blaquiere* (*b*), Lord Cottenham treated the question of the validity of a deed providing for a future separation as unsettled; and in the later case of *Cocksedge v. Cocksedge* (*c*), Sir Jas. Wigram, V. C., directed a case for the opinion of a court of law on the point, which, it is believed, has not yet been argued.

16. It would seem that a deed providing for a future separation with the consent of trustees or other persons would be valid. Thus, it was decided by the Court of King's Bench in *Rodney v. Chambers* (*d*), that the husband's covenant with his wife's trustees to pay her an annuity as separate maintenance in the event of a separation in future taking place between them, with the approbation of the trustees, was a legal and valid covenant: and the judges were unanimously of opinion that the trustees were intitled to recover in an action against the husband the arrears which had accrued on the annuity after separation. That such a covenant was binding seems to have been tacitly admitted by the Court of Common Pleas in the case of *Gawden v. Draper* (*e*), which was considered in the preceding case; and the validity of the like covenant does not appear to have been doubted in *Chambers v. Caulfield* (*f*), for there the deed made provision for the event of a future separation, and the husband covenanted, "that in case of future differences, and his wife should at any time thereafter find

(*a*) *Hindley v. Westmeath*, 6 B. & C. 200; 9 Dowl. & Ry. 351; S. C. *Westmeath v. Salisbury*, 5 Bligh, N. R. 339.

(*b*) 5 M. & C. 229.

(*c*) 5 Hare, 397.

(*d*) 2 East, 283.

(*e*) 2 Ventr. 217.

(*f*) 6 East, 244.

it necessary to live separate and apart from him, he would permit and suffer her to leave him, &c., provided the separation took place with the approbation of the trustees or of the survivor." And Lord Ellenborough, C.J., in thoroughly canvassing that instrument, instead of doubting its validity, seems to have considered it as good and binding. Upon *Rodney v. Chambers* being referred to in the argument, Lawrence, J., thus expressed himself: "In that case there was an averment that the separation was with the consent of the trustees. We thought that there was nothing illegal in the parties agreeing to refer the question, what was a good cause of separation, to a domestic forum, instead of applying to the Ecclesiastical Court for a divorce and alimony. The Court, therefore, only decided in that case that a covenant for separation and separate maintenance with the consent of the trustees was good; not that a covenant was good generally that a wife might separate herself from her husband whenever she pleased, for that would be to make the husband tenant at will to the wife of his marital rights."

17. This case does not seem to be inconsistent with *Durant v. Titley*, and the later authorities which have been cited. As Mr. Jacob observes (*a*), "In *Durant v. Titley*, the effect of the deed was to provide a separate maintenance for the wife, whenever she should be living apart from her husband, leaving it to her to separate from him at pleasure. In *Rodney v. Chambers*, the deed was made as an inducement to a reconciliation after some differences had arisen, and it provided a separate maintenance for the wife, only in the event of a future separation with the approbation of the trustees. The cases are, therefore, distinguishable; and in *Jee v. Thurlow* (*b*) Lord Chief Justice Abbot stated that, in deciding *Durant v. Titley*, it was not intended to shake any former decision. It was different, he said, from the former cases, as the deed provided for the future sepa-

(*a*) 2 *Rop. H. & W.* 281 *n.*

(*b*) 2 *Barn. & Cress.* 551.

ration of a husband and wife who were living together at the time. Mr. Justice Bailey observed, that in *Rodney v. Chambers*, the intervention of impartial persons was required to decide whether sufficient cause of separation did or did not exist; and seems to have thought (in conformity with the opinion of Mr. Justice Lawrence(*a*)), that it was not illegal to refer such questions to the decision of a domestic forum; an opinion which is in some measure sanctioned by the cases of *Soillieux v. Herbst*(*b*) and *Bateman v. Ross*.(*c*)”

(*a*) Cited *antè*, p. 311.

(*c*) 1 Dow, 235.

(*b*) 2 Bos. & Pull. 444.

CHAPTER II.

OF THE EFFECT OF SOME OF THE COVENANTS CONTAINED IN
DEEDS OF SEPARATION.

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| <p>3. <i>Covenant to prevent suit for restitution of rights, and exercise of control over wife.</i></p> <p>4. <i>Void in Ecclesiastical Court.</i></p> <p>5. <i>Whether valid in temporal courts.</i></p> <p>6. <i>Mr. Jacob's opinion.</i></p> <p>7, 10. <i>Cases on Habeas Corpus.</i></p> <p>12. <i>Whether covenant can be enforced by prohibition or injunction: Mr. Jacob's remarks.</i></p> <p>13. <i>Whether agreement for separation will be enforced personally in equity.</i></p> | <p>14. <i>Effect of wife's adultery subsequent to deed of separation.</i></p> <p>15. <i>Covenant by husband to give up custody of children.</i></p> <p>16. <i>Deed put an end to by reconciliation.</i></p> <p>17. <i>Or by return to cohabitation by sentence of court, semble.</i></p> <p>18. <i>Although by deed separation to be for life.</i></p> <p>19. <i>Effect of sentence of Ecclesiastical Court.</i></p> <p>20. <i>Where wife held intitled to provision in deed after reconciliation.</i></p> |
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1. It has been already stated that deeds of separation, when not contemplating a future separation, are valid so far as relates to the trusts and covenants by which the husband makes a provision for the wife, and the indemnity given to the husband by the trustees.

2. But the effect of some of the other clauses usually contained in deeds of separation is more doubtful.

3. These deeds are generally framed with the view of enforcing the continuance of the separation, either for the lives of the husband and wife, or until they shall again mutually agree to cohabit, and for that purpose covenants are inserted to prevent any suit for the restitution of conjugal rights, and to restrain the husband from exercising personal control over the wife.

4. In the Ecclesiastical Court, provisions of this description are held to be void. They form no objection to a suit for restitution of conjugal rights. (*a*)

5. In the courts of civil jurisdiction, these provisions can of course have no effect as against the wife personally.

Whether they can be enforced as against the husband or the wife's trustees is a different question.

6. The dicta on this subject in the cases on writs of *habeas corpus*, have, as Mr. Jacob observes (*b*), been much questioned (*c*), and seem to be overruled by the principle laid down in *Marshall v. Rutton* (*d*), that the husband and wife cannot by agreement change their legal capacities and characters.

7. The cases on writs of *habeas corpus* are as follows:—

In *Listor's case*, decided nearly a century ago (*e*), the husband during separation from his wife, by their mutual agreement, seized her by force and carried her home, in order to compel her to live with him, contrary to the articles entered into upon their agreement to live apart. To regain her freedom, the wife sued out a *habeas corpus* (*f*); and the Court of King's Bench gave her liberty, assigning the reason,

(*a*) See *Mortimer v. Mortimer*, 2 Hagg. 318; *Westmeath v. Westmeath*, 2 Hagg. Eccl. R. 115, *supp.*

(*b*) 2 Rop. H. & W. 271 n.

(*c*) See 11 Ves. 532.

(*d*) 8 T. R. 545.

(*e*) 8 Geo. 1: see 1 Stra. 477: 13 East, 173, *in notis*.

(*f*) Mr. Roper states that the wife may, under such circumstances, obtain security for her person by filing articles of the peace, or by a supplicavit in Chancery: 2 Rop. H. & W. 317. But, as Mr. Jacob observes (2 Rop. H. & W. 318 n.), the object of articles of the peace and of the writ of supplicavit is merely to prevent personal violence; and the right to

this protection is not connected with engagements for a separation. In the case of a supplicavit, the security is taken, as Lord Hardwicke observes, on the supposition that they are to live together: 3 Atk. 550. Articles of the peace were exhibited by the wife in *Lord Vane's case*, stated 13 East, 171, *in notis*; 2 Stra. 1202. Writs of supplicavit were issued in favour of the wife in *Head v. Head*, 3 Atk. 548; Reg. Lib. B. 1774, fol. 166: and in *Tunnicliffe's case*, 1 Jac. & W. 348. The husband's power of restraining his wife from her liberty was fully considered in the late case of *In re Cochrane*, 8 Dowl. P. R. 630; 4 Jur. 534.

viz., that she and her husband separated by consent and under articles to live apart.

8. The next case was the *King v. Mead*. (a) There the husband covenanted never to disturb his wife, nor any person with whom she should live. The separation took place, and he, in order to have an opportunity of seizing her by force, or for some bad purpose, sued out a *habeas corpus* to bring up her body. The Court held that the agreement was a formal renunciation by the husband of his marital right either to seize his wife, or to force her to live with him; that any attempt by him to seize her would be a breach of the peace; and that if such an attempt were made in her return home from the Court it would be a contempt, and the Court told her she was at liberty.

9. So also in the *King v. Winton* (b), the husband applied for a *habeas corpus* to bring up the body of his wife. Upon a question as to the validity of the return, Buller, J., expressed himself to the following effect: "If this case turn out upon further investigation to be like that in *Burrow*, I am strongly inclined to think this would be an answer to the writ."

10. A similar application was made by the husband for this writ in the *King v. Edgar*. (c) The answer given upon the return of it was, that the wife being intitled to considerable property to her separate use, she and her husband agreed to live apart under articles of separation, by which, in consideration of 3000*l.*, he was to resign all interest in her property; but that he afterwards seized and confined her. Lord Kenyon said that unless the wife had done something notoriously to destroy the articles, it was settled that the husband had renounced all right to her, that he had no claim after the articles of separation. The Court therefore told her she was at liberty, and if she were apprehensive of violence she might have an officer of the Court to protect her.

(a) 1 Burr. 542.

(b) 5 Term Rep. 91.

(c) Rep. B. R. Temp. Lord Hardwicke, by Ridgway, 152, *in notis*.

11. In the late case of *Lewis v. Ponsford* (*a*), it was laid down by Lord Denman, C. J., at *Nisi Prius*, that, until the husband has given distinct notice to persons that, so far as by law he can, he has revoked the license given to his wife in a deed of separation to live where she pleases, and so long as the license stands, he is not justified in going to any person's house to reclaim her.

12. Mr. Jacob observes (*b*), "It has been sometimes mentioned as doubtful, whether the husband's covenant not to sue for restitution of conjugal rights could be enforced by prohibition or injunction. (*c*) In *Westmeath v. Westmeath* (*d*), the Lord Chancellor said he believed that such an injunction had been granted in the time of Lord Bathurst, but that it was the only instance. From the manner in which the point has been spoken of, it may be inferred, that the Courts would now be unwilling to entertain this jurisdiction. In the case last referred to, his Lordship also doubted whether an action at law could be maintained against the husband upon this covenant, and observed, that if he should take the opinion of a Court of law, that should be one of the points referred to them. In this case, a suit on the part of the husband has proceeded in the Ecclesiastical Court (*e*), and it does not appear that any attempt has been made to prevent it by proceedings at law or in equity. The arguments against the policy of these covenants would apply equally whether they were made the subject of an action or an application for an injunction. The latter mode of proceeding would also be open to another objection, from the matter being merely personal, not directly affecting any right of property or pecuniary interest. (*f*)

"In one late case, indeed, a covenant of this kind was

(*a*) 8 Car. & P. 687.

(*b*) 2 Rop. H. & W. 271 n.

(*c*) 8 T. R. 546: 2 Cox, 107: 3 Bro. C. C. 620: 11 Ves. 533: see Butler's case, 1 Freem. 282.

(*d*) Jac. 139.

(*e*) See 2 Addams, 380.

(*f*) See 2 Swan. 413.

brought before the notice of the House of Lords: how far it could be enforced did not come under consideration; but some weight appears to have been attached to it. In *Tovey v. Lindsey* (a), one question was, whether the wife was to be considered as domiciled in Scotland, so as to be within the jurisdiction of the Scotch Commissary Court, where her husband had sued for a divorce. She was in fact living in England apart from her husband, under a deed of separation by which he covenanted to permit her to reside wherever she should think proper. But it was contended that the husband was domiciled in Scotland, and that the domicile of the wife was regulated by that of her husband. On this part of the case the Lord Chancellor observed, that, even if the fiction or rule of law were admitted that the forum of the wife followed that of her husband, so as to give jurisdiction to the Scotch Courts in this case, the effect of the deed must be to put an end to that rule or fiction till the deed was revoked. He himself had agreed that their forum should be different if his wife so pleased; and then he endeavoured by this process to get rid of the effect of his own agreement.' "

13. Mr. Jacob proceeds (b), "It is now settled (notwithstanding an early case to the contrary (c)), that these provisions will not be enforced in equity by a decree establishing the agreement for separation personally. (d) This follows equally whether the covenants be or be not binding on the husband and trustees: the effect of the decree would be to make them binding on the wife."

14. In a case in the Consistory Court of London (e), where the husband sued for a divorce on the ground of adultery committed subsequently to a deed of separation, the suit was dismissed, the Judge being of opinion that the clauses by which it was agreed that the wife might live separately, in

(a) 1 Dow, 117.

(b) 2 Rep. H. & W. 272 n.

(c) *Turner v. Warwick*, Finch,
73.

(d) *Wilkes v. Wilkes*, 2 Dick.
791; 3 Mer. 268.

(e) *Barker v. Barker*, 2 Addams,
285.

such manner, at such places, and with such persons as she should think proper, and that the husband should not molest her in her person or manner of living, or compel her by ecclesiastical censures or otherwise to cohabit with him, or sue any persons for receiving, harbouring, lodging, protecting, or entertaining her, amounted in effect to a license to her to commit the offence of which he complained. As Mr. Jacob remarks (*a*), if this construction were well founded, it would undoubtedly form a strong objection to the validity of most deeds of separation. The cause was heard on appeal before Sir John Nicholl, and it was not necessary for him to decide the point, other evidence being adduced, which was held to prove that the deed was not made with the intention imputed to it, and the sentence of divorce *à mensâ et thoro* was pronounced. In a case occurring shortly afterwards (*b*), where the language of the deed was the same, Sir J. Nicholl considered the objection unfounded: it contained, he said, only the ordinary provisions, which nearly in all cases find their way into deeds of this nature; and it was well settled that these deeds did not bar suits for divorce. (*c*)

15. Deeds of separation sometimes contain a covenant on the part of the husband to resign the children of the marriage, or some of them, to the care of the wife; but the legality of such a covenant has been questioned. (*d*)

(*a*) 2 Rop. H. & W. 272 n.

(*b*) Sullivan v. Sullivan, 2 Ad-dams, 299.

(*c*) See 1 Haggard, 142.

(*d*) 11 Ves. 531. On this subject see Villareal v. Mellish, 2 Swanst. 533: Powell v. Cleaver, 2 B. C. C. 500: Colston v. Morris, 6 Madd. 89: Lecone v. Sheires, 1 Vern. 442. The father is intitled to the custody of the children to the exclusion of the mother, though they be within the age of nurture: Rex v. Greenhill, 4 A. & E. 624; 6 Nev. & M. 244: Rex v. De Manneville, 5 East, 221: *ex*

parte McClellan, 1 Dowl. P. C. 81.

The Court of Chancery, however, representing the queen as *parens patriæ*, has jurisdiction to control the father's right to the possession of the children: *Ex parte* Warner, 4 B. C. C. 101; but neither the Court of Queen's Bench (De Manneville v. De Manneville, 10 Ves. Jun. 59), nor the Court of Common Pleas (*ex parte* Skinner, 9 Moo. 278.), has any such delegated authority. However, where the husband was convicted of felony, the Court of Queen's Bench has granted a *habeas corpus* to give

16. It has been held in several cases, that the effect of a deed of separation is put an end to by a reconciliation, the wife being again maintained by her husband, and the subject of the deed no longer existing. (*a*)

17. Mr. Jacob observes (*b*), that for similar reasons it may be inferred that the same effect would be produced by a return to cohabitation compelled by the sentence of the Ecclesiastical Courts. He adds, "There may perhaps be some difficulty in the application of this principle to cases where the deed not only provides a provision for the wife, but makes a permanent settlement of the husband's property, giving her a future interest, as in *Worrall v. Jacob* (*c*), or

the wife the custody of the children : *Ex parte* Bailey, 6 Dowl. P. C. 311 : and see *Rex v. Dobbyn*, 4 A. & E. 644 *n*.

The Court of Chancery will not deprive the husband of the custody of his children, except in cases of gross misconduct : *Wellesley's case*, 2 Russ. 1 : *Wellesley v. Wellesley*, 2 Bligh, N. R. 124 ; 1 Dow. & Cl. 152 : *Ball v. Ball*, 2 Sim. 35 : *In re Fynn*, 12 Jur. 713 : *re Pulbrook*, 11 Jur. 185 : *re Spence*, 2 Ph. 247 ; 16 Law J. Chan. 309 ; 11 Jur. 399 : and it will not give the possession to a mother who has withdrawn from her husband : *De Manneville v. De Manneville*, 10 Ves. Jun. 52. By the 2 & 3 Vict. c. 54, mothers are enabled to have access to their children, and to have them delivered up, if under seven years of age. The act does not enable the wife to resist the husband's application to the court for the custody of his children : *Correllis v. Correllis*, 1 Dru. & War. 235. The act does not seem to apply to the case where, before the petition has been presented, the husband has removed the children to a foreign country : *In re Taylor*,

11 Sim. 178 ; 9 Law J. N. S. Chan. 399 ; *Taylor v. Taylor*, 4 Jur. 959. Nor will the court make the order pending proceedings in the Ecclesiastical Court, or where the wife has left her husband without sufficient cause : *ibid*. It seems that the order may be made *ex parte*, if the nature of the case require it : *ibid*. It is not required by the act, as a condition of the interference of the court, that the wife should have obtained, or be intitled to obtain, a divorce *à mensâ et thoro* : *ex parte Bartlett*, 2 Coll. 661 ; 15 Law J. N. S. Chan. 418 ; 10 Jur. 768. The Vice-Chancellor of England has jurisdiction under the act, although the Lord Chancellor and Master of the Rolls are alone mentioned in it : *In re Taylor*, 10 Sim. 291 ; 9 Law J. N. S. Chan. 399 ; 4 Jur. 983.

(*a*) *Fletcher v. Fletcher*, 2 Cox, 99 : *Bateman v. Ross*, 1 Dow, 235 : *Jee v. Thurlow*, 3 B. & C. 551 ; 4 Dowl. & Ry. 11 : *Scholey v. Goodman*, 1 Car. & P. 36 : *Westmeath v. Salisbury*, 5 Bligh, N. R. 339.

(*b*) 2 Rep. H. & W. 273 *n*.

(*c*) 3 Mer. 255.

where it contains provisions partly for the benefit of the children." (a)

18. Since a reconciliation in general avoids the deed, it makes no difference in substance, in this respect, whether it be framed with a view to a separation during life, or to a separation until the parties shall agree to cohabit.

19. It seems that a sentence of the Ecclesiastical Court directing a return to cohabitation, even if not obeyed, might also prevent the operation of the deed, at least so far as to prevent it from being enforced in favour of the disobedient party. (b)

20. Where by express provision in the deed the trusts were to continue valid, notwithstanding reconciliation, the wife, who had returned to live with her husband, was held to continue intitled to a provision made for her in the deed. (c)

(a) As in *Hulme v. Chitty*, 9 Beav. 437; 10 Jur. 323: see Lord Eldon's remarks in *Westmeath v. Westmeath*, 1 Dow & Cl. 519. (b) See 2 Cox, 107. (c) *Wilson v. Mushett*, 3 B. & Ad. 743.

CHAPTER III.

OF THE VALIDITY OF DEEDS OF SEPARATION AGAINST THE HUSBAND'S CREDITORS.

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| <p>2. <i>Void against creditors where without consideration.</i></p> <p>4. <i>But valid where for consideration, as indemnity against wife's debts.</i></p> | <p>7. <i>Or relinquishment by wife of alimony.</i></p> <p>10. <i>Or compromise by wife of suit.</i></p> |
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1. WHEN husband and wife have resolved to separate and live apart, since the wife cannot by law contract with her husband, it is necessary that the provision agreed to be allowed by him on that occasion, should be either vested in trustees, or secured by his covenant with them.

2. The rules applicable to settlements made after marriage, which have been already considered (*a*), in most respects apply to settlements upon the wife made on mutual agreement between her and her husband to live apart, since these provisions are made during the marriage. (*b*) If, therefore, a settlement be merely in consideration of an agreement between husband and wife to live separate, it will be void against creditors and purchasers, the statutes of the 13th and 27th Elizabeth extending to such a deed and to such a consideration.

3. Thus, in *Fitzer v. Fitzer* (*c*), A, the wife of B, being intitled to an annuity of 50*l.*, she and her husband agreed to live apart; and B covenanted with trustees, in a deed of

(*a*) See *antè*, book 2, chap. 2.

(*b*) Hence an arrangement as to the wife's property contained in a deed of a separation is void as against her, and cannot affect her title by survivorship to a contingent interest

falling into possession after her husband's death: *Stamper v. Barker*, 5 Madd. 157.

(*c*) 2 Atk. 511: see *Clough v. Lambert*, 10 Sim. 174.

separation, to allow A a separate maintenance of 14*l.* *per annum* out of his own estate, and 24*l.* a year more out of her said annuity, also 12*l.* to his daughter by her. In order to secure these payments, B assigned the annuity to the trustees. The husband afterwards took the benefit of the then insolvent debtors act; and in a suit by A and her daughter against B, and a creditor of his subsequently to the deed (who was also assignee under the act), to have the trusts of the deed performed, Lord Hardwicke declared that the deed was void against the creditor, but good against the husband.

4. As in the case of other settlements after marriage, these provisions upon separation may be obligatory upon creditors and purchasers when made for valuable considerations. Accordingly, if a person or trustees covenant with the husband to indemnify him against his wife's debts, the settlement will be good against his then present or future creditors, and also against subsequent purchasers.

5. Thus, in *Stephens v. Olive* (a), A was intitled to certain real estates for life, subject to a mortgage for 500*l.*, and he and his wife agreed to live apart; A therefore conveyed his life-estate to trustees, first, to keep down the interest of the mortgage, then to pay taxes &c., and, finally, an annuity of 35*l.* to B as separate maintenance. The trustees covenanted to indemnify A against the debts which B might contract after the separation. The trustees entered into possession of the premises, and afterwards a judgment was obtained against A. The creditor instituted the suit to set aside the settlement as being voluntary. But Lord Kenyon, M. R., was of opinion that the settlement was good, and declared that the covenant by the trustees to indemnify the husband against the debts which the wife might contract after the separation was a valuable consideration, and supported

(a) 2 Bro. C. C. 90: *King v.* volume: and *Clough v. Lambert*, 10 Brewster, in a note to that case, p. 93, Sim. 178. S. P.: see also p. 386, in the same

it, although it was made after the debt due to the plaintiff was contracted.

6. In *Worrall v. Jacob* (*a*), A, a trader liable to the bankrupt laws, and B, his wife, executed a settlement after marriage, by which the estate in question, originally her property, stood limited in default of issue of their bodies to the survivor of them in fee. A separation afterwards taking place between them, A covenanted with a trustee, in a deed of separation, to pay to B. an annuity of 70*l.*, and to convey his contingent estate in fee to such persons as B should by deed or will appoint. The trustee, on his part, covenanted to indemnify A against B's debts, and against any demand for alimony which she might at any time make. B made an appointment in favour of the plaintiffs. A survived B, and became a bankrupt and died. The question was between the appointees of the wife, and the assignees of the husband. And Sir William Grant, M. R., determined that the covenant by the trustee, being founded upon a valuable consideration, supported the deed of separation against the assignees.

7. "It is observable, in this case," as Mr. Roper remarks (*b*), "that the covenant extended its indemnity to the wife's claim of alimony in the Ecclesiastical Court, and it seems that, in instances where there is no indemnity to the husband against the debts which the wife may contract, yet if, from his cruelty or other misconduct towards her, he give her a title in that Court to separation and alimony, then the consideration of the wife not prosecuting such her right, but consenting to accept amicably of a settlement in lieu of such alimony, will support the transaction against creditors and purchasers."

8. Thus, in *Hobbs v. Hull* (*c*), the husband (the defendant) being indebted to the plaintiff in judgments and otherwise, a separation took place between him and his wife; upon which occasion he settled part of his real estates, to the

(*a*) 3 Meriv. 256.

(*c*) 1 Cox Rep. 445.

(*b*) 2 Rep. H. & W. 289.

yearly amount of 300*l.*, upon his wife for separate maintenance, and on the children of the marriage. It appeared that, previously to the separation, the husband had lived in a state of adultery; and it was insisted, in answer to the bill filed by the judgment creditor to set aside the settlement as voluntary, that since the wife was, in consequence of her husband's misconduct, intitled to a divorce *à mensâ et thoro*, and consequently to an allowance for alimony, her acceptance of the provision by settlement in lieu of alimony was a valuable consideration, which supported the deed against the husband's creditors. And so it was determined; the Master of the Rolls thus expressing himself: — "I am now bound to decide the question, whether the husband having behaved so ill as to intitle his wife to obtain a divorce in the Spiritual Court *à mensâ et thoro*, and to have a proper allowance from him, if the wife, instead of strictly prosecuting that right, meet the husband on the threshold, and say she will accept the maintenance proposed by him without litigation, whether this can be said to be such a voluntary act as to be fraudulent against creditors. Surely this settlement can never be said to be without consideration, when the wife in this case agrees to accept this settlement, instead of resorting to enforce her right in the Ecclesiastical Court; surely she is giving up something for it. I am therefore very clearly of opinion, that this is not one of those agreements which the statute of Elizabeth meant to prevent. I do not go upon any motives of compassion, when I decree as I am now about to do, not upon the conduct of the parties, but upon the rights in law, which I take to exist between them. And I shall dismiss this bill with costs as to all parties but the husband, and as to him without costs."

9. The principle of this case was recognised by the Court of King's Bench in *Nunn v. Ladbrooke*.^(a) There the husband received 1800*l.* with his wife, his own pro-

^(a) 8 Term Rep. 521.

perty being about 200*l.* only. He contracted several debts, and having used his wife with great cruelty, they agreed to live apart, under a deed of separation, by the terms of which he, in consideration of 200*l.* lent by A, and paid to the husband on the part of the wife, and of the agreement to live separate, and in order to make provision for her, assigned to trustees all the farming stock belonging to his farm at P (which farm he proposed to quit and assign in consideration of the 200*l.*), cattle, corn, &c., household goods and furniture, chattels, and effects, upon or belonging to the farm, or wherever else the same might be, together with his interest in the lease, and all debts then owing to him, in trust, at the discretion of his trustees, either to carry on the farming business, or to sell his property and collect his debts, &c. ; and with the proceeds (after deducting the expenses of sale, &c., and repaying A the 200*l.* advanced by him, with all other monies due to him by the husband), in trust to pay all or such part of the husband's debts as they should think proper, and the residue or surplus to the wife for her separate use and disposal. The trustees entered upon their trust immediately after the execution of the deed, sold the greater part of the goods, &c., and, after a proper advertisement, paid all such of the husband's creditors as sent in their demands twenty shillings in the pound, after which there remained a balance of 329*l.* 19*s.* 1*d.*, exclusive of some articles bought in by one of the trustees, and enjoyed by the wife on the farm, of the value of 111*l.*, and of the lease of the value of 500*l.* After the separation the wife resided constantly upon the farm, and received the produce or profits by the hands of the trustees. About two months after the execution of the deed, the husband became a bankrupt, and having died intestate, the assignees sued the wife as *executrix de son tort*, so that the question for the Court to decide was, whether the deed of separation was or was not void against the subsequent creditors of the husband? And the Court was of opinion that it was good, as being neither fraudulent

CHAPTER IV.

OF THE JURISDICTION OF EQUITY IN DECREERING THE PERFORMANCE OF AGREEMENTS FOR SEPARATION AND FOR SEPARATE MAINTENANCE.

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| <ol style="list-style-type: none"> 1. <i>Equity will not enforce agreement for separation.</i> 2. <i>But will oblige husband to perform agreement to pay separate maintenance.</i> 3. <i>Whether agreement enforced where between husband and wife only.</i> 4. <i>Mr. Roper's opinion.</i> 8. <i>Mr. Jacob's remarks.</i> 9. <i>More v. Ellis.</i> 10. <i>Mr. Jacob's remarks thereon.</i> 11. <i>Whether separate maintenance decreed to wife living apart from husband.</i> 14. <i>Effect of separation upon husband's right to property accruing to wife.</i> 15. <i>Effect of agreement between husband and trustee for wife, where husband not indemnified against her debts.</i> | <ol style="list-style-type: none"> 20. <i>Lord Eldon's opinion.</i> 21. <i>Wife may enforce agreement though no indemnity.</i> 23. <i>Where maintenance secured by deed or bond.</i> 25. <i>Agreement à fortiori enforced against husband where valuable consideration.</i> 27. <i>Where wife's property is subject of agreement.</i> 30. <i>Durand v. Durand.</i> 31. <i>Mr. Jacob's remarks thereon.</i> 32. <i>Wife's property not bound, unless where settled for her separate use.</i> 33. <i>Wife's rights where trustees refuse to act, or deed lost.</i> 35. <i>Court will not order an appropriation of fund to secure payment.</i> 36. <i>Apportionment of wife's allowance.</i> |
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1. WITH respect to the jurisdiction of Courts of Equity upon the subject of separation, it may be considered as a general rule that they will not infringe upon the jurisdiction of the Ecclesiastical Court by enforcing the performance of a mere personal contract entered into between husband and wife to live apart. (a) In *Worrall v. Jacob* (b), this was considered by Sir William Grant, M.R., to be settled; and in *Wilkes v.*

(a) *Vide antè*, p. 317.

(b) 3 Meriv. 268.

Wilkes (*a*), where the husband by deed agreed that the wife should live separate from him, Sir Thomas Clark, M.R., refused to carry such agreement into execution, saying, that such a subject was not within the province of a Court of Equity. Indeed, whether the contract be executory, as resting in articles, or be complete, as by deed, and the trusts declared, the Court will not decree the performance of an agreement or covenant for the separation of husband and wife. (*b*)

2. But although the Court will not, in direct terms, decree a separation between husband and wife, yet it will do so indirectly by compelling the husband to perform his agreement to pay separate maintenance. Sir William Grant, in the above case of *Worrall v. Jacob*, noticed the singularity, and after alluding to the Court's refusal to carry into execution articles of separation between husband and wife, proceeded thus: "It should seem to follow that the Court would not acknowledge the validity of any stipulation that is merely accessory to an agreement for separation. The object of the covenants between the husband and the trustee is to give efficacy to the agreement between the husband and the wife, and it does seem rather strange, that the auxiliary agreement should be enforced, while the principal agreement is held to be contrary to the spirit and policy of the law. It has, however, been held that engagements entered into between the husband and a third party shall be held valid and binding, although they originate out of, and relate to, that unauthorised state of separation in which the husband and wife have endeavoured to place themselves. I am, therefore, only to repeat what Lord Eldon has said in the case of *Lord St. John v. Lady St. John*, viz. 'if this were *res integra*, untouched by dictum or decision, I would not have permitted such a covenant to be the foundation of an action or a suit in this Court. But if dicta have followed dicta, or decision has followed decision, to the extent of settling the law,

I cannot, upon any doubt of mine as to what ought originally to have been the decision, shake what is the settled law upon the subject.'"

The cases, however, have established the distinction between a decree for a separation and one for maintenance under the husband's agreement, as will more fully appear from the authorities after stated.

3. It has been observed that a married woman is by law unable to contract with her husband or any other person. A Court of Law, therefore, cannot interfere to compel payment by the husband of an allowance stipulated to be made to his wife upon an agreement between themselves, without the intervention of trustees. The question then arises, whether a Court of Equity will decree the performance of such an engagement by the husband upon his and his wife's mutual agreement to live separate, when the contract is between them alone, and is merely executory.

4. Mr. Roper seems to consider (a) that Equity would so decree, except where either the husband or wife apply to the Court for an appropriation of the produce of her property as maintenance, in order to enable her and her husband to carry into effect their *intentions* of separation; because that would almost amount to a direct decree for a separation, which is not within the province of Equity.

5. And in several cases, such as *Head v. Head* (b), and *Guth v. Guth* (c), it seems to have been held that the wife, though unable to contract for other purposes, was competent to contract with her husband for the purpose of a separation.

6. Thus, in *Guth v. Guth* (d), the husband and wife having resolved to live apart, the terms, as agreed upon between them, were contained in a deed poll signed by the husband, by which he stipulated to allow, pay, or cause to be paid to his wife 100*l.* a year for life, for the maintenance of herself and her child; and if she contracted debts without

(a) 2 Rop. H. & W. 289. .

(c) 3 B. C. C. 614.

(b) 3 Atk. 547.

(d) *Ubi sup.*

his consent, which he should be compelled to pay, the agreement was to be void. The annuity being unpaid, the wife filed a bill for the recovery of the arrears; and the Court decreed payment, after an examination of most of the prior cases.

7. However, Lord Rosslyn, in the case of *Legard v. Johnson* (a), and Lord Eldon in *Lord St. John v. Lady St. John* (b), expressed strong doubts of the validity of a contract entered into between husband and wife alone to live separate, and consequently of the Court's jurisdiction to enforce that part of it by which the husband engaged to pay her a separate allowance. The latter judge observed, in the case last mentioned, that the question had never been put upon the contract of the husband and wife; but that the Court had always put it upon the contract between the husband and the trustee, from the covenant of the trustee to indemnify the husband against her debts. Hence Lord Eldon's opinion seems to be, that the Court ought not to decree the husband to allow maintenance upon his agreement with his wife to pay it.

8. "And," as Mr. Jacob remarks (c), "the same opinion was expressed by Sir J. Leach, V. C., in *Elworthy v. Bird* (d), and it seems now to be clear that a Court of Equity will not perform a mere agreement between the husband and wife, by which the former is to pay a separate maintenance to the latter. The wife being unable to contract, the agreement is without consideration. The question would admit of a different view if the wife was possessed of separate property, and agreed to relinquish or settle it; this might be a consideration for the husband's agreement."

9. *More v. Ellis* (e) is cited by Mr. Roper (f) as an authority for the validity of agreements for separation

(a) 3 Ves. 352.

(b) 11 Ves. 532.

(c) 2 Rop. H. & W. 293 n.

(d) Cited *post*, p. 336.

(e) Bunb. 205; 1 Bro. Parl. Cas. 237, ed. Toml.

(f) 2 Rop. H. & W. 294.

entered into between husband and wife alone. There the wife had abandoned her husband, and during her elopement became possessed of considerable property, which was vested in trustees for her separate use and disposition. The husband having met her, took possession of her person; and on the following day articles of agreement were entered into between them, by which, in consideration of his permission for her to live apart, she engaged to settle upon him 200*l.* a year for life, and to pay him 1000*l.* out of her separate estate. Upon the bill of the wife to be relieved against, and the bill of her husband for a performance of the articles, the Court of Exchequer, after an issue at law, finding that they were voluntarily executed by the wife, confirmed the transaction.

10. But, as Mr. Jacob observes (*a*), the decree declared that the articles were well executed by the wife pursuant to the power vested in her by the will of her father; they took effect as an appointment, and the case is therefore distinguishable from those where there has been merely an agreement.

11. To the principle that a Court of Equity declines to do any thing which may tend to the continuance of a divorce between husband and wife, under their mutual agreement to live apart, when the husband is under no obligation to allow separate maintenance, may be ascribed the decision of the case of *Duncan v. Duncan* (*b*): by which the Court refused to decree to the wife separate maintenance out of her own property whilst she lived apart from her husband by their mutual consent, no improper conduct being imputable to him, and she not being destitute of all provision. The case was to this effect. The wife at the time of her second marriage was intitled, under the will of her first husband, to a part of his personal estate vested in trustees, and also to 3000*l.* in her own right. The latter

(*a*) 2 Rep. H. & W. 294 *n.*

(*b*) G. Coop. 254 ; 19 Ves. 394.

sum was settled upon her in contemplation of the second marriage, but her second husband made no provision for her out of his own property. They by mutual agreement lived apart, the reasons for which did not appear. During the separation, the wife by bill in equity prayed a settlement to her separate use of the property to which she was intitled under her former husband's will. But Sir William Grant, M. R., dismissed the suit, observing, that the only facts were, that the husband and wife did not live together, the cause of the separation not appearing; and that no provision for her was made by him in addition to the settlement. Upon such a state of facts, his Honour said, that he did not find any instance in which the Court had ever decreed separate maintenance to the wife either out of her husband's property or her own; that the cases in which the Court had interfered were, where the husband had been guilty of cruelty, or turned his wife out of doors, or quitted the kingdom without making any provision for her, but that where the case went no further than that merely of husband and wife living apart, he could find no authority for decreeing separate maintenance to her, still less for making any addition to what had been already settled upon her. (a)

12. "In this case it is observable," as Mr. Roper notices (b), "that the property in question belonged to the wife when the settlement was made; a circumstance which, it is presumed, distinguishes it from the case of *March v. Head* (c), and it is conceived that Sir William Grant did not intend to decide, that if an accessional fortune came to the wife during the separation, she was not intitled to a settlement out of it."

13. In *March v. Head*, the wife had 1000*l.* to her fortune, and no other provision under articles before marriage than her husband's covenant that he would consider himself as

(a) As to separate maintenance,
see *suprà*, vol. I. p. 255., *et seq.*

(b) 2 Rop. H. & W. 292.
(c) 3 Atk. 720: and see *antè*, p. 98.

a freeman of London, and that if she survived him she should have such a share of his personal estate as belonged to the widow of such a person. They lived separate. Upon the deaths of her father and mother she, as their next of kin, became intitled to 1800*l.* more, and an application was made on her behalf for a further provision in consequence of this additional fortune. And Lord Hardwicke was of opinion that she was intitled to such a provision, and referred it to a Master, to receive proposals from the husband for a further provision on behalf of the wife, in proportion to the 1800*l.*

14. This case shows that a mutual separation by consent does not deprive the husband of his right to the personal property which may accrue to his wife whilst they continue in that state, upon the terms of his making a provision for her out of it.

15. The second class of cases are those where the contract was between the husband and a third person acting for the wife, and no indemnity was given to the husband against his liability to pay his wife's debts.

Upon this subject it will appear from the cases next stated, that the wife has precisely the same right as any other *cestuique trust*, to call for the execution of a trust created in her favour. It is a consequence from this proposition that whether the deed of separation securing to her maintenance be purely voluntary, or be supported by a valuable consideration, as the covenant of her trustee to indemnify the husband against her debts, she will be intitled in either case to call for an execution of the trust. (a)

16. *Turner v. Warwick* (b) is a case where the agreement was between husband and wife for a separation, which agreement was completed by a deed demising lands to trustees in trust to apply the rents in payment of an annuity

(a) 13 Ves. 443 : 18 Ves. 99 : and *Fitzer v. Fitzer*, 2 Atk. 511, and see the cases cited *infra*, p. 339. stated *antè*, p. 321.

(b) *Finch*, Ch. Ca. 73 : and see

of 300*l.* for the wife's maintenance. In a suit by the trustees against the husband and the tenants of the premises, Lord Nottingham, with the consent of the parties, ordered all arrears to be paid; and further, that the husband should not molest his wife in her person, nor interfere with any goods which she should acquire.

17. It does not appear that the husband was indemnified against his wife's debts, and it is to be presumed that if for any reason this transaction had been illegal or improper, his Lordship would not have made the above decree even with the consent of the parties.

18. In *Angier v. Angier (a)*, (which it may be inferred from the decree, did not contain any indemnity to the husband against his wife's debts), the husband by articles agreed with a trustee to allow his wife 52*l.* a year, and to permit her to live where she thought fit, without molestation. This agreement was made while a suit by her was pending in the Ecclesiastical Court for separation and alimony. The allowance being in arrear, she filed a bill for the payment of it, and the Court so decreed.

19. *Head v. Head (b)* also falls within this class of cases. There a separation took place, and during its continuance the husband wrote a letter to B, the wife's father, agreeing to pay to her 400*l.* a year quarterly so long as they should continue separate. The allowance being in arrear, she instituted a suit to recover it, which Lord Hardwicke decreed to her. (*c*)

(*a*) Pre. Ch. 496.

(*b*) 3 Atk. 547. 551: and see *Fletcher v. Fletcher*, 2 Cox, 99: *Cooke v. Wiggins*, 10 Ves. 191: and *Seagrave v. Seagrave*, 13 Ves. 439.

(*c*) In this case Lord Hardwicke made an order on motion for the husband to pay 400*l.* to the wife to maintain her till the hearing of the cause, 3 Atk. 295. Similar orders were made by Lord Bathurst in *Yea*

v. Yea, (shortly reported in 2 Dick. 498). A separation had taken place, and the husband had by deed and bond secured to the wife an annuity charged on his estates, and the sum of 500*l.* to enable her to pay her debts: having afterwards refused payment, an action had been brought against him on the deed and bond in the Court of King's Bench, and a verdict obtained: he brought a writ

20. It seems to have been the opinion of Lord Eldon in *Lord St John v. Lady St. John (a)*, that the Court ought not to decree the husband to allow maintenance, when the contract is made between him and the trustee, but without an indemnity or other consideration.

21. But in *Ros v. Willoughby (b)*, where the husband covenanted with the trustee to pay an annuity for the wife's maintenance, it was held that the covenant might be enforced although there was no indemnity against the wife's debts.

22. And in a late case *(c)*, where a bill was filed by the executors and devisees of the husband against the wife and the trustee, and the question was whether in the absence of an indemnity the deed could be enforced, Sir L. Shadwell, V. C., held that it could, taking a distinction between the cases where the wife claimed in competition with creditors, and where with devisees or legatees.

23. *A fortiori*, the wife will be intitled where the husband has secured separate maintenance by a deed conveying an estate, or a bond giving a legal right of action to the wife's

of error, and filed a bill in the Court of Exchequer for an injunction to stay the proceedings in the action. The bill in Chancery was filed by the wife to recover the amount due to her, and to have a receiver appointed. On a motion made after answer, it was ordered that the husband should in a month pay to the wife the sum of 500*l.* towards her support and maintenance, and to enable her to carry on and defend any suits relating to the matters in question; this was to be without prejudice, and subject to the further order of the Court, 24th Jan. 1774: Reg. Lib. B. 1773, fo. 129.

The wife afterwards moved, that a further sum of 1000*l.* might be paid to her by the husband, or that

a receiver might be appointed to receive the rents of his estates for the purposes of the deed of separation, and to pay the sums due to her. An order was made in terms similar to the former order, directing a further advance of 600*l.*, 19th July, 1774; Reg. Lib. B. 1773, fo. 244: see 1 Atk. 277: 2 Bro. P. C. 24. Note by Mr. Jacob to 2 Rep. H. & W. 297.

(a) 11 Ves. 532: see also *Jones v. Waite*, 7 Scott, 338.

(b) 10 Price, 2.

(c) Anon. *cor.* V. C. 1839, reported in a note to *Howarth v. Bostock*, 4 Y. & C. Eq. Ex. 6: see also *Wilson v. Wilson*, 14 Sim. 405; 14 Law J. N. S. 204; 9 Jur. 148; affirmed on appeal, 12 Jur. 467.

trustee. (a) The want of a consideration is not, then, material as between the parties, and a Court of Equity will, if necessary, assist the wife by compelling the trustee to enforce the security against the husband for her benefit.

24. Thus, in *Frampton v. Frampton* (b), where on a separation the husband assigned the dividends of stock to which he was intitled during the joint lives of himself and his wife to trustees for the benefit of the wife, it was held that the transaction was effectual, although there was no indemnity; Lord Langdale, M. R., remarking, that it had never been decided that without the intervention and covenant of a trustee the husband might not voluntarily execute a deed or create a trust in favour of his wife, and that such deed or trust might not be binding as against him even if the benefit of that deed or trust should be made dependent upon an existing or continuing separation, which was the principal, if not the only inducement for the whole arrangement.

25. It being established that the Court will execute a voluntary agreement of the husband entered into with a third person to allow his wife maintenance upon their separation, *à fortiori* it must do so, when the husband receives a valuable consideration for such his engagement as the covenant of a trustee to indemnify him against his wife's debts. Some of the cases upon this subject are mentioned below. (c)

26. In *Elworthy v. Bird* (d), the bill filed by the wife and her trustees prayed a specific performance of an agreement to execute a deed of separation, securing an annuity to the wife, and indemnifying the husband against her debts. The husband put in a demurrer, which was argued before Sir John Leach, V. C. His Honour gave judgment for the plain-

(a) See *Seagrave v. Seagrave*, 13 Ves. 439. 386 : *Stevens v. Olive*, 2 B. C. C. 90.

(b) 4 Beav. 287.

(d) 2 S. & St. 372.

(c) *Seeling v. Crawley*, 2 Vern.

tiffs. He observed that it was very true as a general proposition that a Court of Equity would not specifically perform an agreement for a separation between an husband and wife, for in truth the wife was incapable of entering into such an agreement. But on examining all the authorities, it appeared to him, that although some little doubt had been suggested on the point by some Judges, it had been uniformly decided, that when trustees entered into an agreement to indemnify the husband against the debts of the wife, that was a sufficient consideration for the allowance stipulated to be paid by the husband, and Courts of Equity had never refused to perform such an agreement.

27. The authorities which have been stated in this chapter, with the exception of *More v. Ellis* (a), are instances where the property belonged to the husband. Mr. Roper observes (b), that in *Fitzer v. Fitzer* (c), and in *Bright v. Chapman* (d), the property was the wife's, either wholly or in part, and that no objections were taken to the validity of the transaction on that account. (e)

28. In *Fitzer v. Fitzer*, the wife's maintenance was provided out of the joint estates of her and her husband.

29. In *Bright v. Chapman*, by articles of separation the husband covenanted not to molest his wife, and he was to receive an annuity out of her property, which had been assigned to trustees. Upon his bill for payment of the annuity out of the wife's estate, and after a defence that he, contrary to his engagement, had molested his wife, the Court of Exchequer directed an issue to ascertain that fact, which Mr. Roper presumes it would not have done if the articles had been considered not obligatory, either from the circumstance of the wife being to receive no maintenance from the husband, or of his being to receive a benefit out of her property.

(a) *Antè*, p. 330.

(d) 2 Anstr. 345.

(b) 2 Rop. H. & W. 299.

(e) But see *antè*, p. 330.

(c) 2 Atk. 511, stated *suprà*, p. 321.

30. However, in the case of *Durand v. Durand* (a), where the property belonged to the wife, the Court refused to interfere. In that case, a separation having been agreed upon, which afterwards took place, the terms were, that of 6050*l.* Bank annuities, the wife's separate property, 1500*l.* should be paid to her and the residue to her husband, which the wife said she was desirous of parting with for the sake of living separate. The Chancellor said, he could not find himself justified in interfering in any manner in a business of that sort, where the wife was clearly intitled to the whole, but acceded to the terms of giving up two-thirds for the sake of the separation; his Lordship therefore dismissed her bill filed to accomplish the above object.

31. But, as Mr. Jacob observes (b), "probably the unreasonable terms upon which the agreement was made, influenced the Court in declining to interfere: the report states that *on other terms being agreed to on the part of the husband*, his Lordship dismissed the bill. In other cases the Court has carried into effect deeds by which the wife has given up part of her separate property to her husband, on the occasion of a separation. (c)"

32. This question may probably be thus considered: Since a married woman may dispose of personal property limited to her separate use as a feme sole, and may even give it to her husband, there appears to be no reason why she should not be competent to make it the subject of settlement upon a mutual agreement between her and her husband for a separation. (d) But with respect to her other property not so circumstanced, it appears from *Stamper v. Barker* (e), that a separation deed cannot bind the property of the wife, if not settled to her separate use. So far as it is her deed, it is in-

(a) 2 Cox Rep. 207.

(b) 2 Rep. H. & W. 290 n.

(c) *Wilkes v. Wilkes*, 2 Dick.

791: *More v. Ellis*, stated *antè*, p.

330: see *Bright v. Chapman*, 2

Anst. 345, stated *antè*, p. 337.

(d) *Logan v. Birkett*, 1 M. & K. 220; 11 Law J. 53.

(e) 5 Mad. 279.

operative, on the ground of her coverture, and the concurrence of her friends cannot give it any additional effect. Her property is, therefore, not affected by it, unless reduced into possession during the coverture.

33. It is a consequence of what was before stated in regard to the wife's right to call for the execution of the trust declared in her favour in a deed of separation, and to the same equity in all respects as any other *cestuique trust*, that if her trustees refuse to act, or the deed has been destroyed, she, in the one case, will be intitled to have the trust performed, and in the other to have the loss of the instrument supplied.

34. Thus, in *Seagrave v. Seagrave (a)*, upon the separation of husband and wife, he executed a bond to a trustee for payment to her at the house of B of an annuity of 5*s.* a week during his life; but she was to be permitted to live where she pleased. The bond was burnt by the trustee with the husband's privity and consent, and a bill was filed by the wife for arrears of the annuity, and for the execution by her husband of another bond to a new trustee. The husband in defence insisted upon the circumstances of her leaving the house of B, where she resided, and living in adultery, both of which facts were proved. And Sir William Grant, M. R., after remarking that adultery was no bar to the wife's demand (*b*), directed that she should be at liberty to bring an action in her trustee's name upon the bond, the destruction of which was admitted in the answers of the husband and of the trustee; his Honour observing, that the question which had been made between the parties with regard to the real tenor of the condition would be open, and that it was more fit that such question should be investigated at law than in that Court.

(*a*) 13 Ves. 489: see *Anster v. Holland*, 3 Dowl. & L. P. P. 743; 15 Law J. N. S. Q. B. 229; 10 Jur. 786. (*b*) See *post*, p. 350.

35. In *Cook v. Wiggins* (a), the husband gave a bond to a trustee for payment to his wife of 30*l.* a year during their separation. The annuity having fallen in arrear, the trustee refused to enforce the bond without an indemnity. The wife therefore instituted a suit for payment of the arrears, and also to have the future payments secured, and a fund appropriated for the purpose. But the same judge, although he decreed payment of the arrears, declined ordering an appropriation, assigning as a reason, that a man by granting an annuity did not engage to bring into Court a sum of money sufficient to answer it; and he observed that the very principle of granting an annuity was that the grantor might be able to pay by degrees what he had no means of paying at once.

36. The object of the husband in making a separate allowance to his wife upon their separation by mutual agreement being to provide for her support and maintenance, such allowance will be apportioned upon the death of the wife between the last and accruing times of payment.

37. This was done at law in the case of *Howell v. Hanforth*. (b) In this case a bond was given by the husband to his wife's trustee to pay her 80*l.* a year quarterly. He also gave a warrant of attorney to confess a judgment on the bond. The judgment was entered up, and writs of *fieri facias* were sued out at different times, all of which were satisfied except the last, which was for 78*l.*; in regard to which it was ordered that it should be set aside on payment of all arrears and costs, and that the judgment should stand as a security for future arrears, with liberty to apply to the Court to sue out fresh executions. The wife being dead, leave was asked to take out execution for the proportional arrears of the annuity between the last quarter-day of payment and the

(a) 10 Ves. 191.

see also *Hay v. Palmer*, 2 P. W.

(b) 2 Blackst. Rep. 843. 1016: 502.

death of the wife; and the Court granted the application upon the principle that the annuity was for the separate maintenance of a married woman, settled upon her by her husband; a circumstance which distinguished and excepted it out of the general rule applicable to other cases.

CHAPTER V.

OF THE WIFE'S POWER OF ALIENATION OVER HER SEPARATE MAINTENANCE, AND ITS LIABILITY TO HER DEBTS.

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| <p>2. <i>Hyde v. Price.</i></p> <p>3. <i>Mr. Roper's remarks thereon.</i></p> <p>4. <i>May be charged by wife.</i></p> <p>5. <i>Her power of disposing of savings from separate maintenance.</i></p> <p>7. <i>Rights of wife's creditors against her separate maintenance.</i></p> | <p>8. <i>Mr. Roper's remarks.</i></p> <p>9. <i>Creditor intitled where intention to charge fund apparent, or inferred.</i></p> <p>10. <i>Stuart v. Kirkwall.</i></p> <p>11. <i>How far allowance will discharge husband from wife's debts.</i></p> |
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1. THE question as to the wife's power of absolutely disposing of the funds settled upon her by her husband, in consequence of their mutual agreement to live separate, is one which does not appear to have been finally settled: the adherents to one opinion contending, that the allowance being made for the wife's maintenance, she cannot alien it by anticipation; whilst the persons who entertain the contrary opinion argue, that the wife being a feme sole in regard to this provision, there is no ordinary distinction between the present case, and the ordinary one of a limitation of property to the wife's separate use; so that the *jus disponendi* applies to each case indiscriminately.

2. Of the former opinion Lord Alvanley is supposed to have been, from the case of *Hyde v. Price* (a), in which (so far as it is necessary to state for the present purpose) the trust of 2500*l.*, 3 per cent. Bank annuities, was declared to permit the wife to receive the dividends for her maintenance and support during the joint lives of herself and husband.

(a) 3 Ves. 437.

She and her husband by bond and warrant of attorney, in consideration of 560*l.* advanced by B, and applied in purchasing a commission in the army for the wife's son, secured an annuity to B payable out of the 2500*l.* Bank annuities and the dividends. Lord Alvanley, M. R., held, that the grant of an annuity out of the dividends could not be supported against the wife; and he said that this was not property to which she was intitled to her sole and separate use; that there was a special trust upon it; that she had no dominion over it; that her remedy for a misapplication was in that Court; and that the grant made by her was in defiance of the deed, and therefore could not be enforced in a Court of Equity.

3. Mr. Roper remarks upon this case (*a*) "the property was not limited to the separate use of the wife: it was vested in trustees upon trust as to the dividends for the wife for maintenance; she had no interest in the fund distinct from the special trust declared to be for her maintenance and support. It seems therefore to be a necessary consequence, that any disposition by the wife contrary to the trust could not be enforced in a Court of Equity. This case, then, appears to have been determined upon the special limitation in the deed, and not upon the general proposition, that in no instance can a wife dispose by anticipation of the provision settled on her by her husband in a deed of separation. And it should seem, that where the property is so settled by the husband upon separation, as to vest it in the wife for her separate use, consistency requires that she should have the same powers of disposition over it as over funds given to her in the like form of settlement by any other person. This distinction appears to reconcile all opinions upon the subject, and particularly what seems to have been the opinion of the Court in the case of *Greatley v. Noble* (*b*); for there the trust of Lady Pomfret's allowance upon separation was de-

(*a*) 2 Rop. H. & W. 304.

(*b*) 3 Mad. 79. 94.

clared to be for such intents and purposes as she should notwithstanding coverture direct or appoint, and in default of appointment, for her sole and separate use and disposal. She was therefore, by the effect of the above limitation, a feme sole of the settled property, to which character attached the powers of disposition which have been before noticed."

4. In a late case (*a*), Lord Abinger, C. B., though strongly in favour of the doctrine that separate estate created by deeds of separation ought not to be made the subject of charge by the wife, said that he could not act upon it, however just he might deem it, after the cases had gone to so great a length in giving effect to deeds of separation.

5. As the wife may dispose by will of savings from her separate estate limited to her sole use by a stranger, so also she may dispose of savings from her separate maintenance (*b*); but if she make no disposition, and her husband be the survivor, he will be intitled to them as her administrator (*c*), subject to her separate debts; and during the wife's life her savings will not be liable to her husband's engagements, if the settlement were made for a valuable consideration. (*d*)

6. The intent of the provision made for the wife upon separation being to enable her to procure necessities, it follows that the application of it to those purposes, however it may have been settled, is a legitimate appropriation of the property.

7. It was intimated by Sir J. Leach, V. C., in *Greatley v. Noble* (*e*), that the same necessity existed that the wife should manifest an intention to charge her separate maintenance with the debts of particular creditors, as was considered to exist to intitle her creditors to a claim upon her

(*a*) *Palmer v. Fraser*, 3 Y. & C. Eq. Ex. 499.

(*b*) *Gage v. Lyster*, 2 Bro. P. C. 4. ed. Toml.; 2 New Rep. C. P. 159: see also *suprà*, pp. 224. 298. 304.

(*c*) See *suprà*, vol. I. p. 41.

(*d*) *Suprà*, p. 322.

(*e*) 3 Mad. 94.

separate estate when not settled upon her for support and maintenance upon separation. (a)

8. However, Mr. Roper observes (b) that there appears to be a wide difference in principle between the two cases; for when the property is limited to the wife's separate use, and she cohabits with her husband, the creditor has the husband's security for payment of the debt contracted by the wife for necessaries; it is but just, therefore, to require some evidence of an agreement between her and her creditor that her separate estate should be applied in satisfaction of his demand. But that when the creditor is deprived of the husband's security, by the allowance to the wife of a yearly sum for maintenance upon separation, *i.e.* for the express purpose of discharging her necessary debts, it seems but reasonable that a Court of Equity should consider this to be such an appropriation of the fund for those demands, as to intitle her separate creditors to maintain a suit in equity to subject it, in the hands of her trustees, to the satisfaction of her debts. That Lord Thurlow seems to have had this distinction in view in *Lilia v. Airey* (c) (a case of separation), when he expressed himself thus:—"Upon the question whether a creditor has a right against the separate estate of the wife, and against the husband as allowing it to her, my opinion is, that *primâ facie* a creditor has such right." (d)

9. However, there is no doubt that when the wife's intention appears, or is inferred, to charge her separate maintenance with a debt for necessaries, it will intitle the creditor to a satisfaction of his debt out of the fund provided for such maintenance.

10. Thus, in *Stuart v. Lord Kirkwall* (e), the separate maintenance settled upon the wife was 1600*l.* a year. She accepted a bill of exchange drawn upon her by a milliner for 339*l.* 14*s.* 6*d.* and interest, which bill being dishonoured

(a) See *antè*, p. 249, *et seq.*

(b) 2 Rop. H. & W. 305.

(c) 1 Ves. Jun. 277.

(d) *Suprà*, p. 249, *et seq.*

(e) 3 Mad. 387.

by the wife, a suit was instituted for payment of the debt, not only out of the money then due in the hands of her trustees in respect of her separate maintenance, but also out of future accruing payments, and for an injunction to restrain the trustees from paying any more of the annuity to the wife. After the answers had been filed, application was made to Lord Eldon for an injunction, and that the annuity, as it became due, might be paid into the Bank, &c. ; and his Lordship made an order to that effect. The cause having been afterwards heard by Sir J. Leach, V. C., he decreed according to the prayer of the bill.

11. How far the allowance of separate maintenance to the wife will discharge her husband from the payment of her debts has been already considered. (*a*)

(*a*) *Ante*, p. 18, *et seq.*

CHAPTER VI.

WHAT WILL DETERMINE THE WIFE'S SEPARATE PROVISION.

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| <hr/> 3. <i>Effect of husband's offer to cohabit with wife.</i>
5. <i>Offer of third person paying maintenance to take her to his house.</i> | <hr/> 7. <i>Maintenance determined by subsequent cohabitation.</i>
8. <i>Effect of suit or divorce.</i>
10. <i>Not determined by wife's adultery.</i> <hr/> |
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1. WE have already considered what would determine a maintenance which had been granted by the Court of Chancery out of the wife's own property, for her support during the absence of her husband (*a*); and it appeared that if he offered to live with her, and she refused without a sufficient reason to return to him, such offer and refusal would determine her allowance, because the Court which granted it did so temporarily, viz. till the husband's return and his cohabitation with his wife, if not prevented by his own fault; the Court therefore withdraws the allowance, if cohabitation be prevented by the perverseness or caprice of the wife.

2. But this doctrine does not completely apply in cases where the husband and wife have agreed to live apart, and she has a separate maintenance secured to her by agreement: for that being founded upon express contract between the parties, or between the husband and the friends of his wife, it requires the same mutual agreement to dissolve as to make the contract.

3. The following distinctions seem to have been established in regard to this subject:—

First, that if the agreement for separation be for the lives

(*a*) *Suprà*, vol. I. p. 260, *et seq.*

of the parties, or until both agree to live together again, the wife's consent is necessary to put an end to the allowance of separate maintenance; so that the offer of her husband to take her back again will not have that effect.

Secondly, that if the agreement for separation be merely temporary, or for an uncertain period, then the husband's offer to take her back again, if not artfully and insincerely made, will, without regard to her refusal to return, determine her separate allowance.

4. Of the first proposition, the cases of *Guth v. Guth* (*a*), *Hoare v. Hoare* (*b*), and *Gawden v. Draper* (*c*), are instances. Of the second proposition, the case of *Head v. Head* (*d*) is an instance. There the agreement to pay separate maintenance was confined to such time only as the husband and wife should continue to live apart; *i. e.* with the consent of both parties; and Lord Hardwicke decreed, that the husband having offered to receive his wife, he should receive and treat her as his wife if she would return to him; but in case she did not return within a month, the maintenance should cease for the future.

5. If, however, a third person covenant for a valuable consideration moving from the husband, to pay to the wife a separate maintenance, who was then living apart from her husband by mutual agreement, it seems that the offer of such person to take her to his house will not exempt her from her demand for the separate allowance, because the law imposes upon her no obligation to reside with such person; besides, if such a residence were accepted by her, it would have no effect in promoting a reconciliation between her and her husband; which is the object the law has in view in withholding the maintenance when it is proper to do so.

6. Thus, in *Dutton v. Dutton* (*e*), A, the wife's son, for a valuable consideration, covenanted to indemnify the husband

(*a*) Stated *antè*, p. 329.

(*b*) Stated *antè*, p. 307.

(*c*) 2 Ventr. 217.

(*d*) Stated *antè*, p. 334.

(*e*) 4 Vin. Abr. 178, pl. 18.

(his father) from all debts, charges, and expenses for the maintenance of the wife, who at that time lived apart from her husband by consent. Upon the wife's bill against her husband and A for an allowance for maintenance, A, in defence to the claim, offered to maintain her at his own house. But Lord Cowper, C., ordered her an allowance of 200*l.* a year; his Lordship observing that A, by his covenant, took upon himself the charge of maintaining the wife, and stood in the husband's place, who, under a voluntary separation, was obliged to grant an allowance to her; that A was in the nature of a trustee for the wife to the extent of a reasonable allowance for maintenance; and that she was not bound to accept A's offer to take her to his house.

7. If, after the separation, the husband and wife be reconciled and live together, that circumstance will avoid the deed or articles (*a*), and consequently it will determine the separate allowance; for, by cohabitation, the separation, which was the principal, having ceased, the maintenance, which was the accessory, must expire with it. This was so considered by Lord Eldon in the case of Lord St. John *v.* Lady St. John (*b*), and by Buller, J., in *Fletcher v. Fletcher*. (*c*) The law, in this respect, acts in consistency with the practice of the Ecclesiastical Court; for, in general, when a reconciliation takes place between the parties, there is an end in that Court of the deed or articles of separation. (*d*)

8. It has been decided at law, that a separation deed is not put an end to by an ineffectual suit by the wife for a restitution of conjugal rights, or by a divorce *à mensâ et thoro* obtained by the husband on the ground of her adultery. (*e*)

9. We have seen that in a late case the wife, notwith-

(*a*) See *antè*, p. 319.

(*b*) 11 Ves. 537.

(*c*) 2 Cox Rep. 99. 105. 108.

(*d*) 11 Ves. 537: *antè*, p. 273, note.

(*e*) *Jee v. Thurlow*, 2 Barn. & Cress. 547.

standing reconciliation, was held, under the terms of the deed of separation, to continue intitled to a provision made for her in it. (a)

10. Instances in which adultery by the wife will and will not be a bar to her relief in equity, have been before noticed. (b) But this crime will not incapacitate her from compelling her husband to pay her separate maintenance, because at common law it did not affect her right to prosecute her civil claims. Before the statute of Westminster the 2nd, she was intitled to dower, as before has been shown; and the exception of it by a particular provision proves that in other cases adultery was no bar to the wife enforcing any of her rights in courts of justice.

11. In addition to the instances just referred to, may be added the judgment of Sir W. Grant, M. R., in the case of *Seagrave v. Seagrave* (c), and the case of *Jee v. Thurlow* (d), where it was agreed that adultery committed by the wife would not affect her rights under a deed of separation. In *Scholey v. Goodman* (e), however, this point was doubted, but the case of *Seagrave v. Seagrave* was not cited.

(a) *Ant2*, p. 320.

(b) *Ant2*, p. 87, *et seq.*

(c) 13 Ves. 439.

(d) 2 B. & C. 551; 4 Dowl. &

Ry. 11 : see also *Field v. Serres*, 1 N. R. 121.

(e) 1 Bing. 349; 8 Moo. 350.

CHAPTER VII

OF THE EFFECT OF SEPARATION UPON THE HUSBAND'S RIGHT
OF ACTION FOR HIS WIFE'S ADULTERY, DURING THE PERIOD
OF THEIR LIVING APART.

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| <hr/> 1. <i>Weedon v. Timbrell.</i>
2. <i>Mr. Jacob's remarks thereon.</i>
3. <i>Whether husband can maintain action.</i> | <hr/> <hr/> | 4. <i>Effect where husband has not wholly parted with wife's society.</i> |
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1. It was ruled by Lord Kenyon at *Nisi Prius* in the case of *Weedon v. Timbrell* that actions of this description being founded on the injury which the husband has sustained in the deprivation of the comfort, society, and assistance of his wife, an allegation to that effect being always inserted in declarations of this kind as being material and substantial, the consequence must be, that when the husband voluntarily relinquishes the comfort, society, and assistance of his wife by consenting to a separation from her, he can suffer no less from her incontinency whilst such separation continues; and his opinion was afterwards confirmed by the Court of King's Bench upon argument as to the propriety of granting a new trial. (a)

2. Upon this point Mr. Jacob observes (b): "A similar opinion was intimated by Lord Kenyon in two previous cases (c), in which articles of separation had been executed. In *Weedon v. Timbrell*, it does not appear that there was a deed or articles of separation.

(a) 5 T. R. 357.

(b) 2 Rop. H. & W. 322 n.

(c) *Bartelot v. Hawker*, Peake

N. P. C. 7: *Hodges v. Windham*,
ibid. 39.

"The authority of these cases has been much shaken by *Chambers v. Caulfield*. (a) Lord Ellenborough, upon the opening of that case, desired that it might be argued upon the general point, whether the mere fact of a separation between husband and wife, by deed, were such an absolute renunciation of his marital rights as precluded the husband from maintaining an action for the seduction of his wife, saying that he did not consider that question as concluded by the decision in *Weedon v. Timbrell*.

"The editor has been favoured by Mr. Ryan with a note of a recent case on this point, — *Graham v. Wigly*, 15th Dec. 1824. The parties had separated by consent, and were living apart when the adultery was committed: but there was no deed of separation. Lord Chief Justice Abbot held that the action would lie, saying that the separation was not complete: the wife might sue for restitution of conjugal rights. It is believed that other cases have occurred at *Nisi Prius* in which the doctrine of *Weedon v. Timbrell* has not been followed, and that the general opinion at present is against it. (b)

"It will be remembered, that the case was decided at a time when principles were applied to deeds of separation different from those since adopted. If the proposition laid down in *Marshall v. Rutton* (c), that the husband and wife cannot by agreement alter their legal characters and capacities, be correct, it follows, that notwithstanding such an agreement, the relation of husband and wife, and the rights arising out of that relation, must be still considered as subsisting for all legal purposes; and, therefore, that a separation will not deprive the husband of the legal right of maintaining this action, whatever effect it may have upon the amount of damages."

3. In the case of *Winter v. Henn* (d), Alderson, J., considered that the husband would be intitled to recover unless he had in some degree been a party to his own dishonour,

(a) 6 East, 244. 256.

(c) 8 T. R. 548.

(b) See Hammond's *Nisi Prius*,
p. 232.

(d) 4 Car. & P. 494.

either by giving a general license to his wife to conduct herself as she pleased with men generally, or by assenting to the particular act of adultery, or by having totally and permanently given up all the advantage to be derived from her society. The point, however, must be considered as still unsettled. (a)

4. But the case of *Chambers v. Caulfield* (b) establishes this proposition, that the surrender by the husband of his marital rights to the comfort, society, and assistance of his wife, under the instrument of separation, must be complete and absolute; so that if the husband reserve his wife's assistance for the benefit of their infant children, and she is to have liberty to visit his house as often as she pleases, to afford them all necessary care and attention, in such and the like instances the husband may maintain an action for criminal intercourse with her during the separation, upon the principle that he had not in fact wholly parted with the comfort, society, and assistance of his wife.

(a) See *Harvey v. Watson*, 7 Man. Hardy, 8 Jur. 604: and see 1 Selw. & G. 644; 8 Scott N. R. 379; 2 N. P. 10, 11th ed. Dowl. & L. 343; *S. C. Watson v.* (b) 6 East, 244. 256,

CHAPTER VIII.

OF THE POWER OF COURTS OF EQUITY TO DECREE SEPARATE
MAINTENANCE.2. *Lambert v. Lambert.*3. *Mr. Jacob's remarks thereon.*

1. It seems that in one instance a Court of Equity has referred it to a Master to settle the amount of a proper maintenance for the wife during the separation, which, when made, must have had the effect of discharging the husband from her future debts.

2. This was the case of *Lambert v. Lambert (a)*, which came before the House of Lords in the year 1769, on an appeal from the Court of Chancery of Ireland. The bill was filed by the wife, alleging that she had by fear and duress been driven to execute a deed of separation, which provided her with an inadequate allowance: the husband's defence rested chiefly on a denial of the marriage. The Court decreed that the deed, so far as it might prevent the wife from recovering a maintenance during the separation between her and her husband, should be set aside; and it was referred to the Master to enquire into the circumstances of the estate and fortune both of the husband and wife, and what would be proper to allow the latter for her maintenance during the separation. The decree was affirmed by the House of Lords.

3. Mr. Jacob observes (*b*), "The grounds of this decision do not appear from the report. The language of the decree proceeds upon the supposition, that the deed, while it remained unimpeached, would prevent the wife from re-

(a) 2 Bro. Parl. Ca. 18, ed. Toml.

(b) 2 Rep. H. & W. 308 n.

covering a proper allowance of alimony, which indeed followed from the opinion then prevailing, that a feme covert was competent to contract for a separation. One of the arguments on the part of the wife was, that the object of the suit was to set aside a deed, a matter of which the Court of Chancery clearly had cognizance, and that the rest of the relief was consequential. Possibly, this may have been the reason of the decision. It seems to have been so considered by Lord Loughborough, who in *Ball v. Montgomery* (a) alluded to this case, and said that the authorities were much considered: he added: 'I take it now to be the established law, that no Court, not even the Ecclesiastical Court, has any original jurisdiction to give a separate maintenance. It is always as incidental to some other matter that she becomes intitled to a separate maintenance.' If this was the ground of the case, the principle of it does not apply at present, as a separation deed is not held to be binding on the wife personally, and does not prevent her from suing for alimony. But whatever may have been the principle of this decree, the reference to the Master to fix a proper allowance for a separate maintenance went far beyond the limits within which the Court of Chancery in England has confined its jurisdiction, the powers of decreeing separate maintenance having long since been distinctly disclaimed, except in cases where there is an agreement or a trust for that purpose (b), or where the wife's property is within the control of the Court.

"Lord Loughborough is indeed reported to have said, that if the wife applied to the Court of Chancery 'upon a *supplicavit* for security of the peace against her husband, and it is necessary that she should live apart, as incidental to that, the Chancellor will allow her separate maintenance.' (c) This passage has been quoted by Sir W.

(a) 2 Ves. Jun. 195.

(c) 1 Ves. Jun. 195.

(b) 3 Atk. 550: 2 Cox, 102: 3

Ves. 359.

Grant (a), and the same opinion was advanced in the argument of *Lambert v. Lambert*. (b)

“But there seems to be no reported instance of the exercise of such a jurisdiction, and it would be inconsistent with the object and form of the writ of *supplicavit*. (c)”

4. Except in the particular cases mentioned above, the wife can only obtain a separate maintenance in the Ecclesiastical Courts, where alimony is decreed to be paid to her by the husband during the pendency of any suit between them, and after its termination, if it ends in a sentence of separation on the ground of the husband's misconduct. This will be the subject of the ensuing chapter.

(a) 19 Ves. 397.

(c) See *suprà*, p. 314.

(b) 2 Bro. P. C. 26.

CHAPTER IX.

OF ALIMONY.

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| <ol style="list-style-type: none"> 1. <i>Alimony pendente lite, where allowed.</i> 2. <i>When it may be applied for by wife.</i> 3. <i>From what time computed.</i> 5. <i>Payments after alimony allotted.</i> 7. <i>Permanent alimony commences from sentence of separation.</i> 8. <i>Effect where appeal and sentence of court below affirmed.</i> 9. <i>Amount how determined.</i> 10. <i>Husband's income how estimated.</i> 11. <i>Wife's separate income taken into account.</i> 12. <i>If adequate, no alimony allowed.</i> 14. <i>Where husband insolvent, but intitled to property in reversion.</i> 15. <i>Permanent alimony larger than alimony pendente lite.</i> | <ol style="list-style-type: none"> 16. <i>What amount allowed for permanent alimony.</i> 17. <i>Amount how determined.</i> 18. <i>When varied by subsequent alteration in husband's circumstances.</i> 20. <i>Effect of delay on part of husband or wife in applying to the court.</i> 21. <i>Not defeated by husband's fraudulent assignment.</i> 22. <i>Payment of one year's arrears only enforced.</i> 23. <i>Alimony belongs exclusively to Ecclesiastical Court.</i> 24. <i>But writ of ne exeat regno granted by equity.</i> 25. <i>Cannot be anticipated or charged.</i> 26. <i>Not allotted where divorce for wife's adultery.</i> |
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1. ALIMONY *pendente lite* is allowed in suits instituted either by the husband or wife for divorce, or for restitution of conjugal rights, and in suits for nullity of marriage instituted by the husband. (a)

2. The application may be made by the wife as soon as it appears from the pleadings or the evidence that there has been an actual marriage. (b)

3. And the allowance is usually computed for the return of the citation (c), though in cases of delay occasioned by

(a) 2 Hagg. 204: Poynter on Marriage and Divorce, p. 247.

(b) Ibid.: and 2 Hagg. 199: 2 Addams, 254.

(c) Bain v. Bain, 2 Add. 254.

the husband, it is in the discretion of the Court to allow it from the date of the citation. (*a*)

4. Where the wife appeals from a sentence of separation pronounced against her by reason of her adultery, she is allowed alimony during the pendency of the appeal. (*b*)

5. Payments made after the time when alimony is allotted will be deducted on account of the alimony. (*c*)

6. Where the wife had instituted a suit for restitution of conjugal rights, and alimony had been decreed *pendente lite*, the husband having refused to receive the wife, it was held that she was intitled to alimony subsequently to the decree for restitution, and that, for the purpose of alimony, the cause was *pendente lite* until the husband obeyed the decree of the Court. (*d*)

7. Permanent alimony commences from the date of the sentence of separation. (*e*)

8. Where, on appeal, the sentence of the Court below is affirmed, permanent alimony commences from the date of the sentence of the Court below. (*f*)

9. To determine the amount to be allowed, inquiries are made into the state of the husband's circumstances, as to which he is bound to answer upon oath. (*g*) His statements may be disputed and met by evidence on the part of the wife. (*h*)

10. In the calculation of the husband's income, the estimated value of all marketable securities must be included (*i*), also reversionary property (*k*), but not a mere expectancy. (*l*)

(*a*) 2 Phill. 209.

(*b*) Loveden v. Loveden. In that case the allowance was made from the date of the sentence and appeal, which were on the same day.

(*c*) Hamerton v. Hamerton, 1 Hagg. Eccl. R. 23.

(*d*) Taylor v. Taylor, Privy C., 6 Jur. 633.

(*e*) Cooke v. Cooke, 2 Phill. 40.

(*f*) Frankfort v. Frankfort, 8 Jur. 1105.

(*g*) Fraser v. Fraser, Poynter, p. 248.

(*h*) Brisco v. Brisco, 2 Hagg. 199.

(*i*) Harris v. Harris, 1 Hagg. Eccl. R. 351.

(*k*) Stone v. Stone, 3 Curt. 341; 7 Jur. 380.

(*l*) Ibid.

The amount of capital embarked, or the particulars of partnership concerns, ought not to be stated, but only the income. (a)

11. The Court also takes into consideration any separate income of which the wife may be in receipt, whether arising from separate property or pin-money (b), or from an allowance secured to her by a deed of separation. (c)

12. And if her separate income is adequate, no allowance of alimony is made. (d)

13. In *Westmeath v. Westmeath* (e), it was held that the husband was not intitled to a deduction in respect of small sums which had been left to the wife for her separate use, nor in respect of her salary as Lady of the Bedchamber, but that he was intitled to a deduction in respect of a salary granted to her from the Crown.

14. Where the husband, who had brought a suit for a divorce, was an insolvent, but it appeared that he would be intitled to property on his father's death, the Court refused to make any allowance of alimony, but stayed the proceedings until some small sum was afforded to the wife for maintenance. (f)

15. A more liberal allowance is made for permanent alimony than for alimony *pendente lite*, both because the delinquency of the husband is then established, and because the Court considers the situation of the wife during the continuance of the suit to call for retirement and seclusion. (g)

16. In several instances, a third part of the joint income has been assigned to the wife for permanent alimony; in some as much as a moiety. (h) One-fifth has been mentioned

(a) *Higgs v. Higgs*, 3 Hagg. Eccl. R. 473.

(b) 2 Hagg. 201. 203 : 1 Phill. 40 : 2 Phill. 153.

(c) *Blaquiere v. Blaquiere*, 3 Phill. 258.

(d) See *Wilson v. Wilson*, 2 Hagg. 203 : *Davies v. Davies*, *ibid.* 204 n. : 1 Phill. 40.

(e) 3 Knapp, P. C. C. 42.

(f) 1 Curt. 566.

(g) *Cooke v. Cooke*, 2 Phill. 44 : *Otway v. Otway*, *ib.* 109 : *Brisco v. Brisco*, 2 Hagg. Consist. R. 201 : *Rees v. Rees*, 3 Phill. 390 : *Kempe v. Kempe*, 1 Hagg. Eccl. R. 532.

(h) See *Cooke v. Cooke*, 1 Phill.

in one case, as a reasonable proportion for the allowance *pendente lite* (a); in others a larger allowance has been made. (b)

17. The proportion is not regulated by any certain rule, but in determining it the Court is influenced by all the circumstances of the case; allowing less where the husband has children to maintain (c), where expenses have been thrown on him by extravagance on the part of his wife (d), or where his income is derived from his personal exertions (e); and allowing more where a large part of the property has been derived from the wife. (f)

18. Where there have been circumstances of aggravation in the husband's conduct (g), it is in the discretion of the Court to vary the amount in case of a subsequent alteration of the husband's circumstances. (h)

19. It has been held that the reduction of the husband's income by unprofitable speculations is no ground for a proportionate reduction of permanent alimony allotted twenty years before. (i)

20. Where both parties had long abstained from applying to the Court, the one for a reduction of alimony, the other to enforce the regular payment of it, the Court has refused to interfere. (k)

21. The wife's title to alimony will not be defeated by the fraudulent assignment by the husband of his property after the commencement of the suit. (l)

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| 40: <i>Otway v. Otway</i> , <i>ibid.</i> 109: | (f) 2 Phill. 44. 235. |
| <i>Smith v. Smith</i> , <i>ibid.</i> 235: <i>Streat v.</i> | (g) 2 Phill. 46. 110: 2 Add. 2: |
| <i>Streat</i> , 2 Add. 2: <i>Kempe v. Kempe</i> , | 3 Hagg. Eccl. R. 657. |
| 1 Hagg. Eccl. R. 532. | (h) See <i>Poynter</i> , p. 253: and 2 |
| (a) 2 Hagg. 201; 1 Hagg. Eccl. | Phill. 110: 3 Add. 270: 3 Hagg. |
| R. 526. | Eccl. R. 329: <i>Stone v. Stone</i> , 9 Jur. |
| (b) <i>Smith v. Smith</i> , 2 Phill. 152: | 381. |
| see 3 Phill. 390. | (i) 4 Hagg. Eccl. R. 273. |
| (c) 2 Phill. 110: 3 Phill. 259: 1 | (k) <i>De Blaquiere v. De Blaquiere</i> , |
| Hagg. Eccl. R. 529. | 3 Hagg. Eccl. R. 322. |
| (d) 2 Hagg. 202. | (l) 2 Hagg. Eccl. R. 5. |
| (e) 2 Phill. 44. | |

22. The Court will not in general enforce the payment of arrears of alimony beyond one year. (a)

23. Alimony is a subject which belongs properly and exclusively to the Ecclesiastical Courts. (b) It was accordingly held in a late case (c), that a bill could not be maintained in equity by the executors of the wife against the husband for arrears of alimony.

24. The only cases in which equity has exercised any jurisdiction on the subject seem to have been in granting the writ of *ne exeat regno*; this interference having arisen from the circumstance that the Ecclesiastical Court cannot compel the husband to find bail. (d)

25. It seems that alimony cannot be anticipated or charged. (e)

26. Alimony will not be allotted in case of divorce for adultery on the wife's part; for as that amounts to forfeiture of dower after his death, it is a sufficient reason why she should not partake the husband's estate while living. (f)

(a) *Wilson v. Wilson*, cited in a note to *De Blaquiere v. De Blaquiere*, 3 Hagg. Eccl. R. 329.

(b) It seems, however, that the writ *de estoveriis habendis* lies for the recovery of it: 1 Bl. Com. 441.

(c) *Stones v. Cooke*, stated in 8 Sim. 321 n.; decided by Lord Lyndhurst on appeal, and reversing the decision of Sir L. Shadwell, 7 Sim. 22.

(d) *Vandergucht v. De Blaquiere*, 8 Sim. 323. The cases on this sub-

ject are collected in Daniell's Chancery Practice, p. 1562, 2d ed. by Headlam; to which may be added the early case of *Roebuck v. Roebuck*, 2 Coop. (t. Cot.) 251: Lord Eldon, however, appears to have entertained a strong opinion against the writ being applied to the case of alimony: *ibid.* 253.

(e) *Vandergucht v. De Blaquiere*, 8 Sim. 323; 5 M. & C. 229; 3 Jur. 1116.

(f) 3 Bl. Com. 94, 95.

CHAPTER X.

OF THE EFFECT OF A DIVORCE UPON THE RIGHTS AND
LIABILITIES OF HUSBAND AND WIFE.

SECTION I.

OF THE EFFECT OF A DIVORCE A MENSA ET THORO.

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| <hr/> 1. <i>Wife does not become a feme sole.</i>
2. <i>Husband may release wife's legacy.</i>
3. <i>Whether wife barred of dower.</i>
4. <i>Shute v. Shute.</i>
5. <i>Where wife's rights by custom of London forfeited.</i> | <hr/> 6. <i>Greene v. Otte.</i>
7. <i>Husband restrained from selling wife's term.</i>
8. <i>Where husband discharged from payment of wife's debts.</i>
9. <i>Husband's concurrence in conveyance of wife's property dispensed with.</i> <hr/> |
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1. A DIVORCE *à mensâ et thoro* does not destroy the relation of husband and wife so as to make the latter a feme sole. (a)

2. We have seen (b) that after such a divorce the husband may release a legacy bequeathed to his wife.

3. The wife will not be barred of her dower merely by such a divorce. (c)

4. *Shute v. Shute* (d) has been cited as an authority that equity will not assist a widow in recovering her dower, who has been divorced for adultery. But that case is not an authority for this position. There, after a divorce *a mensâ et thoro*, the husband died intestate. The wife by bill prayed assistance as to dower and administration (it being granted to another), and distribution. The Master of the Rolls bid her go to law to try if she was intitled to dower,

(a) *Suprà*, p. 74.

(b) *Suprà*, vol. I. p. 72.

(c) *Suprà*, vol. I. p. 539.

(d) *Pre. Ch.* 111.

there being no impediment, and, as to that, dismissed the bill: as to the administration he said, the granting that is in the Ecclesiastical Court, but the distribution more properly belongs to this Court; but since in the Ecclesiastical Court she is not sued as wife, as she is intitled to administration, therefore the bill must be dismissed as to that too; and he added, that if she could repeal that sentence, she would then be intitled to distribution.

5. A wife divorced *a mensâ et thoro*, on account of her adultery, forfeits her right to her moiety and widow's chamber, according to the custom of London. (a)

6. In *Greene v. Otte* (b), it was held that a divorce *a mensâ et thoro* obtained by the wife against her husband on the ground of adultery and ill-treatment after his bankruptcy, did not intitle her in equity to the whole of a fund bequeathed to her, which came into possession after the bankruptcy, although no settlement was made upon her at her marriage, and the husband at that time received 1500*l.* stock in her right; but a reference was made for approving a proper settlement on her.

7. In an early case (c), after a divorce *a mensâ et thoro*, an injunction was moved for to prevent the husband from selling a term belonging to the wife. The Court at first thought it should not be granted, because the marriage continued, and the husband had the same power over it as before the divorce; but it was afterwards granted; for though the marriage continued, notwithstanding such divorce, yet the husband did no act as a husband, nor the wife as a wife.

8. It has been stated, that where alimony has been decreed, the payment of it, although insufficient, will discharge the husband from liability to his wife's debts. (d)

9. We have seen that in certain cases the Court of Common Pleas is authorised to dispense with the husband's

(a) *Pettiifer v. James*, Bunb. 16.

(b) 1 S. & St. 250.

(c) *Anon.* 9 Mod. 43, 44.

(d) *Suprà*, p. 19.

concurrence in the wife's conveyance of her estates. (a) One of these cases is where the husband is living apart from his wife, either by mutual consent, or by sentence of divorce.

SECTION II.

OF THE EFFECT OF A DIVORCE A VINCULO MATRIMONII.

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| 1. <i>What acts avoided by divorce.</i> | 9. <i>Husband not liable for wife's debts after divorce ab initio.</i> |
| 2. 3. <i>Whether wife shall have her personal estate again.</i> | 10. <i>Wife loses her title to dower.</i> |
| 4. <i>She may enter under 32 H. 8. c. 28.</i> | 11. <i>May sue and be sued as a feme sole.</i> |
| 5. <i>Effect upon gift to husband and wife and heirs of their bodies.</i> | 12. <i>Effect of divorce granted by Act of Parliament.</i> |
| 6. <i>Upon joint purchase of lands by husband and wife.</i> | 13. <i>Clauses in divorce bill at suit of husband.</i> |
| 7. <i>Whether husband intitled to emblements.</i> | 14. <i>Clauses in bill at suit of wife.</i> |
| 8. <i>Whether obligation revived made to wife by husband before marriage.</i> | 15. <i>Provision made for wife out of husband's estates.</i> |
| | 17. <i>English marriage not dissolved by foreign divorce.</i> |
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1. WITH respect to a divorce *a vinculo matrimonii*, it is laid down in Brooke (b), that things executed, where the husband is seised in right of the wife, shall not be avoided by divorce, as waste, receipt of rent, seisin of ward, presentment to a benefice, gift of goods of the wife, &c. But otherwise it is in matter of inheritance, as if the husband discontinues or charges land of his wife, releases or manumits villein, &c.

2. Where the marriage is void *ab initio*, the husband acquires no right over his wife's property. (c) Accordingly

(a) *Suprà*, p. 48.

(b) Br. Deraignment, &c. pl. 18.

(c) *Aughtie v. Aughtie*, 1 Phil.

lim. 203.

it is laid down in Dyer (*a*), that where the marriage is void *ab initio*, if the wife has any goods or personal estate, she ought to have them again, for *cessante causâ cessat effectus*.

3. But if the husband had given or sold them without collusion before the divorce, there is no remedy; but if by collusion, she may aver the collusion, and have detinue of the whole whereof the property may be known, and as for the rest, which consists of money &c., she shall sue in the Spiritual Court (*b*), and prohibition does not lie. (*c*)

4. It has been stated that if the husband aliened his wife's land, and they were afterwards divorced *a vinculo matrimonii*, the wife, during the life of her husband, might enter by the stat. 32 H. 8. c. 28. (*d*)

5. If land be given to a man and his wife, and the heirs of their two bodies together, and they are divorced *a vinculo matrimonii*, they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them. (*e*)

6. If the husband and wife purchase jointly, and are dis-seised, and the husband releases, and after they are divorced, the wife shall have the moiety; though before the divorce there were no moieties; for the divorce converts it into moieties. (*f*)

7. If a lease be made to husband and wife during coverture (which gives them a determinable estate for life) and the husband sows the land, and afterwards they are divorced *a vinculo matrimonii*, the husband shall have the emblements, for the sentence of divorce is the act of the law. (*g*)

(*a*) 13 *a.*: see Br. Coverture. pl. 82: Br. Deraignment and Divorce, pl. 10: Stevens *v.* Totty, Cro. El. 908. pl. 19.

(*b*) Br. Deraignment and Divorce, pl. 10.

(*c*) Br. Deraignment, pl. 17., cites F. N. B. tit. Prohibition. But Brooke adds a quære, if the property had been altered by sale or otherwise before the suit commenced.

(*d*) *Suprà*, vol. I. p. 165: see Co. Litt. 326. *a*.

(*e*) Co. Litt. 28: see Br. Taille Dones, &c. pl. 9, cites 7 H. 4. 16, *per* Thirning, J.: Br. Deraignment, &c. pl. 15, cites 13 E. 3.

(*f*) Br. Deraignment, pl. 18, cites 52 H. 8.

(*g*) 5 Rep. 116.

8. In an early case it is laid down that if a man is bound to a feme sole, and afterwards marries her, and afterwards they are divorced, the obligation is revived. (a) This case was cited and agreed to by Holt, C. J., in *Cage v. Acton* (b), because the divorce being *a vinculo matrimonii*, by reason of some prior impediment, as *præcontract*, &c., makes them never husband and wife *ab initio*; but if the husband had made a feoffment in fee of the lands of his wife, and then the divorce had been, that would have been a discontinuance, as well as if the husband had died, because there the interest of a third person had been concerned, but between the parties themselves it will have relation to destroy the husband's title to the goods; and it proves no more than the common rule, viz., that relation will make a nullity between the parties themselves, but not amongst strangers.

9. After a divorce *ab initio*, the liability of the husband for his wife's debts does not continue; for where the wife becomes a single woman by operation of law, it is the same as if she had always remained single. (c)

10. On a divorce *a vinculo matrimonii*, the wife loses her title to dower. (d)

11. And after such a divorce she may sue and be sued alone as a feme sole. (e)

12. The points laid down in the above authorities seem to apply to divorces *a vinculo matrimonii* granted by the Ecclesiastical Courts, where the marriage is declared null and void *ab initio*. (f) What are the effects of a divorce *a vinculo matrimonii*, granted by act of parliament, does not very clearly appear.

(a) Br. Coverture, pl. 82, cites 26 H. 8. 7. per Fitzherbert and Norwich.

(b) 1 Ld. Ray. R. 521: but see Dy. 140. pl. 39.

(c) *Anstey v. Manners*, 1 Gow, N. P. C. 10.

(d) Co. Litt. 32 a: 33 b: 7 Rep. 140.

(e) *Hatchett v. Baddeley*, 2 Bl. 1079: see *Leon v. Schutz*, 2 Bl. 1195. and *suprà*, p. 70.

(f) As to the grounds for which such divorces will be granted, see *suprà*, vol. I. pp. 6, 7.

13. However, in all bills of divorce at the suit of the husband, there are five enacting clauses : —

The first of these enacts, that the bond of matrimony being violated and broken by the manifest and open adultery set forth in the preamble, the same is hereby from henceforth dissolved, annulled, vacated, and made void to all intents, constructions, and purposes whatsoever.

The second clause enacts, that it shall be lawful for the complainant, at any time after the passing of the bill, to marry again as freely, in all respects, as if the party convicted of adultery were actually dead ; and that the issue of any such future marriage or marriages shall be legitimate and inheritable, in like manner and form as other issue born in lawful wedlock.

The third clause enacts that he shall be intitled to be tenant by the courtesy of the lands, &c. of any after-taken wife or wives ; and, on the other hand, that such after-taken wife or wives (unless barred), shall be intitled to dower, free-bench, thirds, &c.

The fourth clause enacts, that the guilty wife shall be barred of dower, free-bench, thirds, &c.

The fifth clause bars and excludes the husband from all right and title in respect of any *future* property or estate, real, personal, or mixed, that may be afterwards acquired by the wife from whom he is divorced. (*a*)

14. When the wife is complainant, the third clause of the bill enacts that she shall be intitled to dower, and free-bench of the lands of any future husband or husbands ; and that such husband or husbands, on the other hand, shall be intitled to be tenant by the curtesy of her lands, &c.

The fourth clause enacts, that the guilty husband shall be barred of all right and interest in any lands or estates, real, personal, or mixed ; and all ornaments, wearing apparel, goods, chattels, and personal estate and effects whatsoever enjoyed by the wife, or to which she is intitled in possession

(*a*) Macqueen's Practice of the House of Lords, 507.

in her own right, or which she may at any time thereafter acquire, become seised, or possessed of, or intitled to. (a)

15. In passing such bills it is the ordinary course of the legislature to make some provision for the wife out of the husband's estates. (b)

16. In the late case of *Hastings v. Orde* (c), on the marriage of a female ward of court, her fortune, consisting of sums of stock and other choses in action, was settled with the sanction of the court, in trust for her husband and herself for their lives, with remainder to their children, with remainder to the wife absolutely, if she survived her husband, but if she should die in his lifetime, then as she should appoint by will, and in default of such appointment, in trust for her next of kin, according to the statute of distribution, as if she had died unmarried and intestate. There was no issue of the marriage, which was, some years afterwards, dissolved by act of parliament. The husband afterwards released all his right and interest under the settlement to the wife. It was held by Sir L. Shadwell, V. C. E., that the marriage having been put an end to, and there being no issue, the wife was not bound by the settlement.

17. It must be borne in mind that no divorce or proceeding in the nature of a divorce in any foreign country, Scotland included, will have the effect of dissolving a marriage contracted in England. (d)

(a) Macqueen's Practice of the House of Lords, 508.

(b) 2 Steph. Com. 313: Macqueen's Practice of the House of Lords, 537.

(c) 11 Sim. 205.

(d) Lolley's case, Russ. & Ry. C. C. 237; 2 Cl. & Fin. 567 n;

Tovey v. Lindsay, 1 Dow, 117; *Conway*, otherwise *Beasley v. Beasley*, 3 Hagg. Eccl. R. 639; *McCarthy v. Decaix*, 2 Russ. & M. 614; *Warrender v. Warrender*, 9 Bligh, N. R. 89; 2 Cl. & Fin. 488; 2 Shaw & Maclean, 154.

APPENDIX.

No. I.

On the Law relative to the Solemnization of Matrimony. By Mr. Jacob. (a)

PREVIOUSLY to the Marriage Act (*b*), the legal validity of marriages depended upon the doctrines of the Ecclesiastical Courts. Some former statutes (*c*) had inflicted penalties upon parties concerned in the celebration of clandestine marriages, but without venturing to control the rules which the church had established with reference to their validity. An opinion was commonly entertained that matrimony, ordained and regulated by the divine law, was not to be treated as a human institution, and was not a proper subject for the interference of the civil legislature. This opinion formed one of the principal grounds upon which the new principle of nullity of marriage, introduced by the Marriage Act, was opposed.

(*a*) *Vide supra*, vol. I. pp. 2, 3, 4. 6. 8. This discussion formed No. 1. of the Addenda to Mr. Jacob's edition of Roper. The passages and references inclosed within brackets have been added by the present writer.

(*b*) 26 Geo. 2. chap. 33. It is said, that at the time when this act was introduced, the attention of the legislature had been particularly drawn to the subject, by a case which came before the House of Lords in its judicial capacity. The case seems to have been that of *Cochran v. Campbell*, an appeal from Scotland, noticed in the opinions given in *Dalrymple v. Dalrymple*, 2 Hagg. 105. 125. That case was decided by the House of Lords on the 31st of Jan. 1753, and on the same day it was ordered that the judges should prepare

a bill for the better preventing clandestine marriages. Lords' Journals, vol. xxviii. p. 14. But although the example which this case furnished of the effects of the Scotch law of marriage was probably the immediate occasion of the measure, it was confined to England. Some alteration in the law of Scotland was, however, contemplated at the time: after the bill had been committed, it was ordered that the Lords of Session in Scotland should prepare a bill for the more effectually preventing clandestine marriages in that part of the kingdom. Lords' Journals, vol. xxviii. p. 98.

(*c*) 6 & 7 Will. 3. chap. 6, sec. 52. 7 & 8 Will. 3. chap. 35. sec. 2, 3, 4 10 Anne, chap. 19, sec. 176.

That statute also effected another important alteration in the law of marriage, by the clause (a) enacting that no suit or proceeding should be had in any Ecclesiastical Court, to compel a celebration of marriage *in facie ecclesiæ*, by reason of any contract of matrimony, whether *per verba de præsentī* or *per verba de futuro*. (b) Before the passing of this statute, the Spiritual Courts possessed the power of decreeing the performance of a contract of matrimony; and as such a contract was thus capable of being enforced, it had for some purposes the effects of marriage.

In later times the attention of the Courts has seldom been called to the distinctions which previously prevailed upon this subject, and expressions have sometimes been used, which seem to imply an opinion that a matrimonial contract, unattended with any religious ceremony, was before the alteration of the law equivalent to a marriage legally solemnized. (c) This opinion is understood to have been explicitly advanced in a recent case. (d) Upon the trial of an issue out of the Court of Chancery, on the legitimacy of a person born before the Marriage Act, the Lord Chief Justice of the King's Bench is said to have ruled, that at that period a contract of matrimony *per verba de præsentī* constituted a legal marriage. On a motion for a new trial, the question was elaborately argued before the Lord Chancellor, but did not ultimately call for a decision.

The question, though not one of frequent occurrence in England, is still of considerable importance with reference to marriages in Ireland and the colonies, and to marriages amongst the two sects which are excepted from the operation of the Marriage Act. It may not, therefore, be useless to devote a few pages to the discussion of this point.

Matrimonial contracts, or spousals, were divided into contracts *per verba de futuro*, and contracts *per verba de præsentī*: and contracts of the former description, when followed by carnal intercourse, were commonly considered equivalent in legal effect to contracts *per verba*

(a) Sec. 13.

(b) This clause was brought into its present shape by amendments made in the Committee of the House of Commons: the word "contract" was inserted instead of "precontract," as it previously stood; and the words, "whether *per verba de præsentī*, or *per verba de futuro*, which shall be entered into," &c.

were added. Commons' Journals, vol. xxvi. p. 835. The words "nor to any marriages solemnized beyond the seas," in the last section, were also added by the Commons. Ibid.

(c) See 8 Taunt. 837: 2 Hagg. 64: 1 Dow, 181.

(d) Beer v. Ward.

de presenti. (a) Contracts *per verba de futuro*, without consummation, might be released by mutual consent; and it appears that the Spiritual Courts had not the power of effectually enforcing them. (b) But a present contract or a future contract, *cum copulâ*, could be carried into effect by those Courts. It was held not to be releasable, and formed a ground for avoiding a subsequent marriage with another person. In these respects, the consequences of a matrimonial contract corresponded with those of marriage; but an examination of the authorities will show it to have been settled from a very early period, that until the contract was sanctioned by a religious ceremony, performed by a person in holy orders, it was incomplete; that it was not held to constitute lawful matrimony, and that it did not confer the civil rights incident to that state.

At one period, it seems to have been held that a scrupulous observance of the prescribed forms in the solemnization of matrimony was essential. In Fitzherbert's Nat. Brev. (c), it is said that a woman married in a chamber shall not have dower by the common law. "Quære of marriages made in chapels not consecrated, for many are by licence of the bishops married in chapels, &c.: and it seemeth reasonable, that in such cases she shall have dower." So in Foxcroft's case (d), a man shortly before his death, and while infirm, and in his bed, was privately married to a woman then enceint by him; the marriage was performed by the bishop, but without the celebration of any mass: it was held to be void, and the issue adjudged a bastard. A similar case is mentioned as having occurred in 10 Edward 4. (e)

But the strictness of these rules was relaxed, and it was afterwards generally agreed, that the ministration of a priest alone was sufficient to give the contract the essentials of a marriage *in facie ecclesiæ*, and to confer the privileges of lawful matrimony. Thus it is laid down, that if a man and woman are married by a priest in a place which is not a church or chapel, and without any solemnity of the celebration of mass, yet it is a good marriage, and they are baron and feme. (f)

In *Weld v. Chamberlayne* (g), the marriage was by a priest, but a ring was not used according to the book of common prayer. It was

(a) See 2 Hagg. 66.

(b) 2 Burn. Eccl. Law, 457; Swinburne on Spousals, p. 232, edition of 1686.

(c) 150, N.

(d) 10 Ed. I.; 4 Vin. Ab. 218, pl. 18.

(e) 4 Vin. Ab. 38, pl. 21: see also stat. 25 Hen. 8. ch. 21, cited *post*.

(f) 4 Vin. Ab. 38, pl. 21: and see Perk. 306: *Tarry v. Browne*, 1 Sid. 64; Wood's Institutes, p. 59.

(g) 2 Show. 300.

doubted whether this informality might not vitiate the marriage, and a case was ordered to be made upon the point; but the Chief Justice Pemberton inclined to think it a good marriage, there being words of contract *de presenti*, repeated after a parson in orders.

In the case of *Holder v. Dickenson* (a), on a motion in arrest of judgment in an action by a woman for a breach of promise of marriage, Vaughan's opinion was against the plaintiff; and one of his reasons was, that a priest was requisite to the marriage, and that she ought therefore to have averred in the declaration, "*quod obtulit se*, in the presence of a parson." The other judges differed from Vaughan, not as to the necessity of the intervention of a priest, but as to the necessity of introducing such an allegation into the declaration.

It is laid down by Perkins (b), that if a man make a contract of matrimony with J. S. and die before the marriage solemnized between them, she shall not have dower, for she never was his wife. So also he says, that after a contract of matrimony between a man and woman, yet one may enfeoff the other, for they are not one person in law; and if the woman dieth before the marriage solemnized, the man shall not have her goods as her husband. (c) "And," he says, "it hath been holden, that if a man contract himself unto a woman, *et postea cognovit eam carnaliter*, and afterwards he doth enfeoff the same woman of a carve of land, and puts her in seisin thereof, and afterwards marryeth her *in facie ecclesie*, that this feoffment is void, because that it is made *post fidem datam, et carnalem copulam, et sic tanquam inter virum et uxorem*; for that the marriage is subsequent, &c. But at this day, if such a feoffment be made, it is good enough. But after the marriage celebrated between a man and a woman, the man cannot enfeoff his wife, for then they are as one person in law." It is to be observed, that the case here put is that of a contract *cum copulâ*, which, it is agreed, was of the same legal effect as a contract expressly *per verba de presenti*. The earlier case referred to, in which it had been held that the feoffment made after the contract was avoided if the parties intermarried, was probably founded on the notion that the subsequent marriage had relation back to the time of the contract; a notion which was entertained by the civilians, and which was applied by them to legitimate children born before the marriage of their parents.

(a) 1 Freem. 95; Carter, 233; 3 Keb. 148. (b) Sec. 306.

(c) Sec. 194.

In Lord Hale's notes to Co. Litt. (a), the following case is given : " A contracts *per verba de presenti* with B, and has issue by her, and afterwards marries C *in facie ecclesiæ*. B recovers A for her husband, by sentence of the ordinary, and for not performing the sentence he is excommunicated : and afterwards enfeoffs D, and then marries B, *in facie ecclesiæ*, and dies. She brings dower and recovers, because the feoffment was *per fraudem mediate* between the sentence and the solemn marriage ; *sed reversatur coram rege et concilio quia prædictus A non fuit seisitus*, during the espousals between him and B." Lord Hale adds, "*Nota*, neither the contract nor the sentence was a marriage."

In *Bunting v. Lepingwel* (b), A contracted matrimony with a woman *per verba de presenti*. She afterwards married B, and A then libelled against her upon the contract in the spiritual court ; it was decreed that she should marry A, and her marriage with B was declared null : she accordingly married A, and had issue by him. The question was, whether the plaintiff, one of the issue of this marriage, was legitimate ; and it was adjudged in his favour. The objection was, that B was not a party to the suit in the spiritual court ; and that the marriage with him having been solemnized in church, was voidable only, and not void ; and that it could not be dissolved, except by a sentence in a suit for that purpose, in which he should have been cited. The civilian who argued on the other side contended that by reason of the precontract the marriage with B was *quasi* null : after the contract, he said, the parties became baron and feme by the civil law, and their issue born after the contract, and before marriage, were legitimate if a marriage followed ; if not, he admitted that issue born after the contract were illegitimate : and when the marriage followed, it had relation to the contract, and rendered an intermediate marriage void and adulterous : and by this relation, he contended that the marriage with A was sufficient to avoid the intermediate marriage with B, even without a sentence : he also relied upon the effect of the sentence ; and according to Lord Coke, the case was decided upon the ground that credit must be given to that sentence, as being on a matter peculiarly belonging to the cognizance of the Court which pronounced it. In this case, it was admitted that the contract did not render the subsequent marriage with another *ipso facto* void ; though it was said that such marriage became void

(a) 33a, note 10.

(b) Moor, 169 ; 4 Co. 29.

upon the contracting parties afterwards having intermarried; and it seems to have been always well settled, that a precontract was one of those impediments which rendered the marriage voidable only, and not *ipso facto* void; and which, on that account, could only be taken advantage of during the lives of the parties. (a) On the other hand, it was always well settled, that a marriage with one person, actually solemnized, rendered a subsequent marriage with another absolutely void.

The position that issue born after a contract *per verba de presenti* are illegitimate, if the parents do not subsequently marry, was admitted in the above case of *Bunting v. Lepingwel*; and the doctrine of relation, by which the civil law gave a retrospective effect to the marriage as to questions of legitimacy, was not admitted by the common law. So, according to Godolphin, a child born before marriage celebrated between the father and mother is called a bastard by the common law (b); and when the question of general bastardy was referred to the ordinary, the matter to be tried by him was, whether the party was born in lawful matrimony (c); the same expression which was used in cases of dower: it follows, that the same species of marriage was required to confer the rights of legitimacy as to confer the right of dower.

In Paine's case (d), it was said in argument, that on a sentence for dissolution of a marriage, on the ground of precontract, the parties contracted became husband and wife by the sentence without further solemnity; and an opinion given by Noy, in reading to that effect (e), was cited: but Twisden denied this, and said that the marriage must be solemnized before they could be completely baron and feme.

In *Heydon v. Gould* (f), letters of administration of the wife's effects were granted to the husband; the next of kin sued for a repeal, suggesting that there had been no marriage. The parties were Sabbatarians, and had been married by one of their ministers, using the forms of the common prayer except the ring, and they had cohabited till the woman's death. It appeared, however, that the

(a) Co. Litt. 33a.: 6 Co. 66b.: see *Hemming v. Price*, 12 Mod. 432. 419; and Blackst. Comm. vol. i. p. 434.

(b) *Repertorium Canonicum*, chap. xxv. pl. 2.

(c) Ibid. pl. 6.; Ayliffe's *Paregon*, p. 109, edit. of 1726. So Glanville says,

"*Hæres autem legitimus, nullus bastardus nec aliquis qui ex legitimo matrimonio non est procreatus, esse potest.*" Lib 7, ch. 13.

(d) 1 Sid. 13.

(e) Dyer, 105b, note.

(f) 1 Salk. 119; 2 Burn. Eccl. Law, 472.

minister was a mere layman, and not in orders; upon which the letters of administration were repealed. Upon appeal, this decision was affirmed by the delegates. The reason was said to be, that the man demanding a right due to him as husband by the ecclesiastical law, must prove himself a husband according to that law, to intitle himself in this case; and that though perhaps the wife, who was the weaker sex, or the issue, who were in no fault, might intitle themselves by such marriage to a temporal right, yet the husband himself, who was in fault, should never intitle himself by the mere reputation of a marriage without right. It was argued, that this marriage was not a mere nullity; that the contract was sufficient by the law of nature; and that though the positive law ordained that the marriage should be by a priest, that made such a marriage as this irregular only; but that it was not void, unless the positive law had gone on and ordained expressly that it should be so. This argument, however, was overruled; and a case in Swinburne, where such a marriage had been ruled void, and the act of Parliament for confirming the marriages during the usurpation, were referred to; and it was said that the form of pleading marriage was *per presbyterum sacris ordinibus constitutum*.

In this case it was clear that the ceremony amounted at least to a contract *per verba de presenti*, yet it was held not to confer the civil rights of a husband. This case was mentioned, in a recent judgment of Sir John Nicholl's, as one in which the marriage, not being celebrated by a priest, was held to be a mere nullity. (a) Sir W. Wynne observed on it, that the marriage was one according to their own invention, and the Prerogative Court refused to acknowledge it. (b)

In *Hervey v. Hervey* (c), in a suit for jactitation of marriage, evidence was given that the parties had for eighteen years lived together, acknowledging each other, and being received as husband and wife. The Chancellor of London, notwithstanding this evidence, thought himself bound by the rules of the ecclesiastical law to pronounce against the marriage: the canons (he said) not allowing a marriage to be proved *inter vivos*, by mere circumstantial evidence. His sentence was affirmed by the dean of the Arches. On appeal to the delegates, they decided differently, holding, that after such deliberate acknowledgment and avowal on the part of the husband of

(a) 2 Phill. 21.

(c) 2 W. BL 877.

(b) 1 Hagg. App. 8.

the truth of the marriage, he could not be permitted to impeach it. In this case the question on which the Courts differed was, whether the marriage could be proved by evidence of this nature? It is obvious that this question could not have arisen if it had been supposed that a mere verbal contract could constitute a marriage: on that supposition, there could have been no doubt that an acknowledgment of the existence of the relation of husband and wife must be taken as direct evidence of a present contract, in the same manner as in the Scotch law. (a)

The judgement of Sir E. Simpson, in *Scrimshire v. Scrimshire* (b), a case relative to the validity of a marriage celebrated abroad, which occurred shortly before the Marriage Act, forcibly illustrates the doctrine at that time adopted by the Ecclesiastical Courts. The marriage in question had been solemnized by a Roman Catholic priest according to the Roman ritual: the learned judge doubted whether even this species of marriage would be deemed perfect if it had taken place in England. He said, that "as a priest popishly ordained is allowed to be a legal presbyter, it is generally said that a marriage by a popish priest is good; and it is true, where it is celebrated after the English ritual, for he is allowed to be a priest: but upon what foundation a marriage after the popish ritual can be deemed a legal marriage is hard to say. Indeed the canon law received here calls an absolute contract *ipsum matrimonium*, and will enforce solemnization according to English rites; but that contract, or *ipsum matrimonium*, does not convey a legal right to restitution of conjugal rights, though an English priest had intervened, if it were otherwise than according to the English ritual. Upon what reason or foundation then should a contract of marriage entered into by the intervention of a popish priest, not in the form prescribed by law, be deemed a legal marriage in this country, more than any other contract that is considered by the canon law as *ipsum matrimonium*?" (c) He then refers to a case in Ireland, where a marriage by a Roman Catholic priest, according to the popish ritual, had been held valid, and questions the decision. "I apprehend, unless persons in England are married according to the rites of the church of England, they are not intitled to the privileges attending legal marriages, as thirds, dower, &c. How can a bishop try or certify such a marriage? Can he certify that English subjects, residing in

(a) See *M'Adam v. Walker*, 1 Dow,
148.

(b) 2 Hagg. 396.

(c) Ibid. 400.

England, were lawfully married according to the laws of England, if they were not married according to the rites prescribed by act of parliament for marriages in this country? Would a contract only by the intervention of a Romish priest or any priest, be deemed a legal marriage? The Roman ritual not being the same with ours, such a ceremony is nothing more than a contract.”(a) He afterwards remarks, that in the case before him there was “a fact of marriage by the intervention of a priest; without which, undoubtedly, by our law, it cannot be a contract.”(b)

The doubt here expressed on the question, whether the use of the established ritual be essential, appears to have been set at rest by other authorities, particularly by those relating to Roman Catholic marriages in Ireland and in England before the Marriage Act; but the reasoning of the learned judge is important as showing that the necessity of the intervention of a priest in some form was a point then considered to be free from any doubt, and as pointing out the material difference in the view of the ecclesiastical law, between a marriage solemnized by a priest, and a contract which, though said to be *ipsum matrimonium*, was not then supposed to confer the civil rights of property or the power of suing in the Ecclesiastical Courts for restitution of conjugal rights. It explains the meaning of the expression *ipsum matrimonium*, as applied to a contract, and shows that that expression did not imply that such contracts possessed the qualities, or produced the consequences, attending a marriage duly solemnized. It was taken to be clear that a contract without solemnization was not a legal marriage; the only doubt was, whether it was essential that one particular form of solemnization should be followed.

In a case (c) which occurred before Lord Stowell in the year 1820, his Lordship observed that it was a generally accredited opinion that if a marriage was had by the ministration of a person in the church, who was ostensibly in holy orders, and was not known by the parties to be otherwise, such marriage should be supported: parties who came to be married were not expected to ask for a sight of the minister's letters of orders; and if they saw them, they could not be expected to inquire into the authenticity. The case put supposed the general rule to be, that the intervention of a priest is a matter of necessity: and if this was the rule at that time, it must have been

(a) 2 Hagg. 402.

(b) Ibid. 404.

(c) Hawke v. Corri, 2 Hagg. 280.
288.

equally so before the Marriage Act of 26 Geo. 2.; for there was nothing in that act which could be construed to be introductive of any new rule on this point: the direction that the solemnization shall be according to the rubric is not enforced by the clause of nullity. The only grounds of nullity of marriage introduced by that act, were the want of a license duly obtained, or of publication of banns, or the solemnization not taking place in a church or chapel: the circumstance of the ceremony not being performed by a person in holy orders is not made a ground of nullity: the other clauses of the act are only directory, the non-observance of them not affecting the validity of the marriage.

In cases of matrimonial contracts, it was the practice of the Ecclesiastical Courts, till their power of entertaining suits founded on such contracts was taken away, to decree the party defendant to solemnize the marriage *in facie ecclesiæ* (*a*), a practice which shows that the marriage was not considered to be complete for all purposes until the ceremony was performed. On the other hand, where the marriage had once been solemnized by a priest, whatever circumstances of irregularity or clandestinity might have attended it, no idea seems to have been entertained of requiring the ceremony to be reiterated. Ecclesiastical censures or other penalties might be incurred (*b*), but the marriage was deemed to be complete.

It appears from the judgment in *Scrimshire v. Scrimshire* (*c*), before referred to, that when the matter rested in contract only, it could not be made the foundation of a suit for restitution of conjugal rights, and the ceremony was therefore essential to confer the chief privileges of marriage. From other authorities, it seems that by the law of the Ecclesiastical Courts, the cohabitation of parties who had entered into a matrimonial contract was not permitted until the solemnization *in facie ecclesiæ*: and intercourse between them in the mean time was punishable by ecclesiastical censures (*d*): it was said indeed to be punished not as fornication, but as a contempt of the laws of the church.

The text writers, who have considered this subject, agree in the

(*a*) Oughton Tit. 209, *et seq.*: 2 Hagg. 82.

(*b*) See *Middleton v. Crofts*, 2 Atk. 650; *Cas. Temp. Hard.* 57: *More v. More*, 2 Atk. 157.

(*c*) See also *Green v. Green*, cited 1

Hagg. Appendix 9, note; and Oughton Tit. 193.

(*d*) See *More*, 170: 6 Mod. 155: 3 Lev. 376: Irish statute 11 Geo. 2. chap. 10, sec. 3, cited *post*.

necessity of a solemnization to confer the civil rights of marriage. Swinburne lays it down, that spousals *de presenti*, without solemnization do not according to the law of England render the issue legitimate or give to the wife the right of dower, or to the husband the right of property in the wife's goods, or of administering to her. (a) The same doctrine is stated by Ayliffe (b), and in Bacon's Abridgment. (c)

So Dr. Burn says, that if the temporal courts write to the bishop to certify whether accoupled in lawful matrimony or not, it seems that the bishop would certify that persons not married according to the forms of the church of England as by law established, were not accoupled in lawful matrimony; and that if a person applies to the spiritual court for any benefit by the ecclesiastical law in virtue of a precedent marriage, it seems that he ought to intitle himself according to that law. (d) In Shepherd's Epitome, it is laid down that marriage is not accounted consummate by our law till it be celebrated and solemnized *in facie ecclesiæ* (e), and that the woman, when espoused or contracted, is not reputed a *feme covert* till married *in facie ecclesiæ*. (f)

A more recent writer, treating of the law of Ireland (g), considers the intervention of a person in orders as necessary to constitute a legal

(a) P. 2. 15. 234, 235.

(b) Paregon, p. 245.

(c) Tit. Marriage, C.

(d) Ecclesiastical Law, 1st Ed. 1763, vol. 2, p. 29.

(e) P. 720.

(f) P. 722.

(g) The general matrimonial law of Ireland is the same as that of England, except so far as changes have been introduced by the difference between the statute law of the two countries. See 1 Addams, 65. The English Marriage Act was not extended to Ireland; but by the Irish statute 9 Geo. 2. chap. 11, marriages and matrimonial contracts of minors, without proper consent, may be annulled by the Ecclesiastical Courts, if either of the parties be intitled to a real estate of 100*l.* per annum, or personal estate of the value of 500*l.*; or if the father or mother of the minor be in possession of real estate of 100*l.* per annum, or personal estate of the value of 2000*l.*; and provided that a suit be commenced

within a year by the father or guardian of the minor, and prosecuted with effect. The Irish statute 12 Geo. 1. chap. 3, enacted, that a marriage consummated should not be set aside on the ground of a pre-contract without consummation: the power of enforcing matrimonial contracts, with this qualification, subsisted till the statute 58 Geo. 3. chap. 81. The other statutes, as to marriages in Ireland by Roman Catholic priests and dissenting ministers, are noticed in the subsequent pages. [By sec. 50. of the 7 & 8 Vic. c. 81, the Irish statute of 9 Geo. 2. is repealed; and by sec. 51. the guilty party is to forfeit all property accruing from the marriage, as in 4 Geo. 4. c. 76. The statute now in force as to marriages in Ireland is the 7 & 8 Vic. c. 81, amended by the 9 & 10 Vic. c. 72. By the 8 & 9 Vic. c. 54, provision is made for the celebration of marriages, until a parish church is erected, in any disunited or newly-erected parish.]

marriage with reference to civil rights. (a) He puts the case of a marriage celebrated by a layman disguised as a clergyman; in which, he says, it seems that a solemnization *in facie ecclesiæ* should be decreed, because, though not properly a marriage, it is a contract *de presenti*. (b)

In a late case in the Arches Court, where the matrimonial law of Ireland came in question, the evidence speaks of solemnization by a priest as one of the essentials to a legal marriage. (c)

The different statutes relating to the subject of marriage concur in showing, more or less pointedly, that this view of the essential distinction between perfect marriages and mere contracts has uniformly prevailed.

When the statute 25 Hen. 8. chap. 21, transferred to the Archbishop of Canterbury the power of granting those licenses and dispensations which had previously been obtained from Rome, it was thought necessary to enact that children procreated after solemnization of marriage by virtue of such licenses or dispensations, should be deemed legitimate in all Courts, as well spiritual as temporal, and should be capable of inheriting. This clause must have been founded upon an opinion, that a compliance with all the canonical regulations might be indispensable.

The statute 32 Hen. 8. chap. 38, "for marriages to stand notwithstanding precontracts," distinguishes in its language between contracts and marriages, speaking of the latter as the true matrimony contract and solemnized in the face of the church. In like manner, the statute 2 & 3 Edward 6. chap. 23, which repeals this act, empowers the ecclesiastical judges, on proof of a contract of marriage, to give sentence for matrimony, commanding solemnization, cohabitation, &c

After the restoration of Charles 2., it was enacted, by the statute 12 Car. 2. chap. 33 (d), that marriages, which, during the usurpation, had been solemnized before justices of the peace according to the parliamentary ordinances, should be of the same force and effect as if they had been solemnized according to the rites and ceremonies established or used in the church or kingdom of England. It was

(a) View of the Civil Law, by Dr. Luffington, Burr. Sett. Cases, 232, cited Browne, professor of Civil Law at Dublin, vol. i. pp. 74, 75, 2nd ed. *post.*

(c) Bruce v. Burke, 2 Addams, 471.

(b) Ibid. pp. 53, 54. See Hawke v. Corri, cited *antè*, p. [377]: and Rex v. (d) Confirmed by stat. 13 Car. 2. chap. 11.

provided, that issues on the point of bastardy or lawfulness of marriage depending on these marriages, should be tried by a jury.

By the act of 6 & 7 Will. 3. chap. 6, certain duties to be paid on marriage were granted to the crown for five years. The 63d section enacted, that all persons commonly called Quakers, or reputed such, and all papists, or reputed papists, whether they were popish recusant convicts or not, and all Jews, or any other persons, who should cohabit and live together as man and wife, should pay the duties thereby granted, as they ought to have done by virtue of the act if they had been married according the law of England, to be collected in the same manner. And upon every pretended marriage which should be made by any such persons within the said term of five years, according to the method and forms used amongst them, the man so entering into such pretended state of matrimony was within five days to give notice to the collectors, on pain of forfeiting five pounds. The next section provided, that nothing therein contained should be construed to make good or effectual in law any such marriage or pretended marriage, but that they should be of the same force and virtue, and no other, as they would have been if the act had never been made.

The 52d section of this act, and the subsequent statute 7 & 8 Will. 3. chap. 35, impose penalties on clergymen celebrating marriage without banns or license; and by the 4th section of the last act, the man so married was to forfeit 10*l*. The object of these clauses was the better collection of the duties. The duties, except those upon licenses, appear to have expired previous to the statute 10 Ann. chap. 19, the 176th section of which recites, that great loss had happened to the duties already laid upon stamped vellum, parchment, and paper, and that other inconveniences daily grew from clandestine marriages; and imposes a penalty of 100*l*. on any parson, vicar, curate, or other person in holy orders, celebrating a marriage without banns or license. These clauses apply only to marriages performed by the intervention of clergymen: they would have been nugatory if marriages could have been constituted without that intervention.

The Irish statute 19 Geo. 2. chap. 13, declares null marriages performed by popish priests, if the parties, or either of them, be protestant; but if the intervention of the priest was not essential, this statute also would be nugatory in cases where the parties cohabited as husband and wife; the acknowledgment of that relation would, as in Scotland, constitute a legal marriage independently of the ceremony. Yet it does not appear to have been doubted, that in

cases within this statute the nullity of the original ceremony was fatal. (a)

Another Irish statute, 11 Geo. 2. chap. 10, sec. 3, recites that several protestants dissenting from the church of Ireland as by law established, scrupling to be married according to the form of ceremony prescribed by the said church, did therefore frequently enter into matrimonial contracts in their own congregations, before their ministers or teachers, and thereupon lived together as husband and wife, and it enacts, that for the ease of such protestant dissenters who had already entered, or should thereafter enter, into such matrimonial contracts, and thereupon live together as husband and wife, that they should not be prosecuted in any ecclesiastical court, *ex officio mero*, or on the presentment of any minister or churchwarden of any parish, for or by reason of their entering into such matrimonial contracts, or for their living together as husband and wife by virtue of such contracts, provided such protestant dissenters, and such minister or teacher, had or should take the oaths and subscribe the declaration according to the statute 6 Geo. 1. chap. 5.

It will be observed, that in this act the term matrimonial contracts is carefully adopted in speaking of marriages by dissenting ministers; and without affirming or implying their legality, they are only exempted from censure. The immunity thus granted was extended by the statute 21 & 22 Geo. 3. chap. 25 (Irish), which recites that the removing any doubts that might have been entertained concerning the validity of matrimonial contracts or marriages, entered into by protestant dissenters, and solemnized by protestant dissenting ministers or teachers, would tend to the peace and tranquillity of many protestant dissenters and their families; and it then declares and enacts, that all matrimonial contracts or marriages theretofore entered into between protestant dissenters, and solemnized or celebrated by protestant dissenting ministers or teachers, should be, and should be held and taken to be good and valid to all intents and purposes whatsoever: and that all parties to such marriages, and all persons claiming under them, should in virtue of such marriages be and be deemed, adjudged, and taken as intitled to all rights and benefits whatsoever, from, under, or in consequence of such marriages, in like manner as if such marriages had been solemnized by a clergyman of the church of Ireland. [(b)]

(a) See Dowling v. Constable, Irish Term Rep. 259: Steadman v. Powell, 1 Addams, 58: Bruce v. Burke, 2 Addams, 471.

[(b) As to marriages of Presbyterians, or protestant dissenters in Ireland, see 5 & 6 Vic. c. 113, 6 & 7 Vic. c. 39, 7 & 8 Vic. c. 91. sec. 4. & 83. By the

A late statute (*a*) for regulating marriages in Newfoundland begins by reciting that a doubt had arisen whether the law of England requiring religious ceremonies in the celebration of marriage to be performed by persons in holy orders, for the perfect validity of the marriage contract, be in force in Newfoundland: it enacts that marriages in that colony, not performed by clergymen, shall be void. (*b*)

The opinion of the necessity of the intervention of a priest recently led to another act, relative to marriages in the British territories in the East Indies. It had been usual for members of the church of Scotland, resident in that country, to be married by ministers of their own church. But Presbyterian ministers not receiving episcopal ordination, are not, according to the English law, deemed to be in holy orders; and it had been held that natives of Scotland, resident in India, were to be considered as having an English domicile. (*c*) It therefore became doubtful whether these marriages were not to be governed by the English law, according to which they would have stood upon the same footing as contracts *de presenti* before the Marriage Act. The statute 58 Geo. 3. c. 84, reciting the doubt on this point, confirms the marriages thus celebrated, giving them the same effect as if they had been solemnized by clergymen of the church of England, according to the rites and ceremonies of the church of England.

The general opinion which prevailed in England before the Marriage Act, of the necessity of solemnization by a priest, appears also from the manner in which clandestine marriages were then conducted. It is well known that at that period such marriages were performed by some disreputable members of the clerical profession,

3 & 4 W. 4. c. 102, certain penal enactments made by the Irish parliaments against Roman Catholic clergyman for celebrating marriages were repealed.]

(*a*) 57 Geo. 3. chap. 51.

(*b*) This act was repealed by the statute 5 Geo. 4. chap. 68, which is to continue in force for five years, and by which any teachers or preachers of religion, licensed by the governor or a secretary of state, are empowered to celebrate marriages in the colony, in places where, by reason of the difficulty of internal communication, it may be inconvenient to attend at a church or chapel of the established church of England. [The

5 Geo. 4. c. 68. was continued by the subsequent acts of 10 Geo. 4. c. 17, and 2 & 3 W. 4. c. 78. It has since been repealed by stat. 3 & 4 W. 4. c. 10. of the colonial parliament (in pursuance of power given by 2 & 3 W. 4. c. 78. sec. 1.), which enacts that all marriages are to be celebrated by persons in holy orders, or by any resident minister publicly recognised as the pastor and teacher of any congregation having a church or chapel, or employed as teachers or preachers licensed by the governor.]

(*c*) Bruce v. Bruce, 6 Bro. P. C. 566, ed. Toml.; 2 Bos. & Pull. 229 n.: Monroe v. Douglas, 5 Mad. 379.

who were to be found at the Fleet Prison, May Fair, and some other places. There would, however, have been no reason for procuring, in these cases, the ministration of a clergyman, if the purpose could have been equally well effected by a private contract, which would have been attended with less inconvenience, delay, and expense, and would, at the same time, have evaded the legal penalties. The marriage shops, as they were sometimes termed, would not have been resorted to; and the services of the Fleet parsons and their runners (*a*) would have been superfluous.

The same opinion pervades the debates in Parliament, on the introduction of the Marriage Act. Lord Mansfield, then Solicitor-General, is represented to have said, "I believe it will be allowed, that if a man and woman seriously and sincerely enter into a marriage contract, without the interposition of a clergyman or any religious ceremony whatever, it will be a good marriage, both by the law of God and the law of nature; yet the law of this society, and, I believe, of every other Christian society, has declared it not to be a good marriage; therefore, why may not we declare those marriages to be void which are solemnized by scandalous, worthless clergymen, in a clandestine manner?" (*b*) Similar ideas were expressed by the other speakers; they agree in ascribing the mischief then complained of to the misconduct of some exceptionable characters amongst the clergy, not alluding to any possibility of affecting a clandestine marriage without their assistance. The act itself appears to have been framed with the same view: it does not nullify contracts *de presenti*, or declare that they shall not be deemed marriages; the enactment that they should not be enforced, by compelling solemnization, was thought sufficient to take away their effect.

The same view must have led to the late statute (*c*), which, using the same terms as the English Marriage Act, takes away from the Ecclesiastical Courts in Ireland the power of enforcing contracts of marriage *per verba de futuro*, or *per verba de presenti*. If a contract *de presenti* was in itself a marriage, without any solemnization, it would be merely nugatory to prevent the solemnization from being enforced.

In the practical application of the ancient law, some distinctions, with reference to the mode of trying and determining the validity of

(*a*) See 2 Atk. 158.

(*c*) 58 Geo. 3. chap. 81. sec. 3.

(*b*) Parliamentary History, vol. 15,
p. 78.

marriages, arose from the different modes in which the question was brought forward, and from the difference of the tribunals before which it came.

There were some few cases in which the issue upon the plea *ne unques accouple*, &c., instead of being referred to the bishop, was tried in the Courts of common law by a jury (*a*); and, with respect to bastardy, there were more extensive exceptions to the general rule, which required a trial by certificate. (*b*) In these excepted cases, however, the issue tried by the jury was the same as that which, in general, was referred to the bishop; and it does not appear that there was any difference between the two modes of trial, with reference to the species of marriage necessary to support the issue.

In other cases, the question of marriage came before the courts of common law in a different form from that in which it presented itself to the ecclesiastical tribunals. The issue to be tried was, whether A was married to B, or whether A was the wife of B (*a*); and in these cases it was held, that what was termed a marriage *de facto* was sufficient to support the issue: the lawfulness of the marriage did not come in question; and it was not necessary to show, as on the issue of *ne unques accouple*, that there had been a marriage *secundum leges ecclesiæ*. (*d*) Thus the marriage *de facto* was valid at law, where it came in question in actions not admitting of a plea disputing its lawfulness. This leads to the inquiry into the distinction between a lawful marriage, and that which was termed a marriage *de facto*; and it will be seen from the cases, that the latter phrase was generally applied to marriages which were open to legal objection, not from the want of the requisite solemnities, but from impediments rendering them liable to be dissolved. (*e*) Thus, marriages which were voidable on the ground of consanguinity, affinity, or precontract, or which, on the ground of nonage, were voidable by disagreement, were termed marriages *de facto*, and were held valid at law until dissolved. But in the spiritual courts objections of this kind were, during the lives of the parties, fatal to the legality of the marriage. It is in this sense that Lord Coke contrasts marriage *de jure* and marriage *de facto*: the

(*a*) 21 Vin. Ab. 44, pl. 17. 21; Cro. son, Andrews, 227: see 1 Lev. 41; Jac. 102; 1 Lev. 41; Ilderton v. Ilder- Vent. 77.
ton, 2 H. Bl. 145.

(*b*) 21 Vin. Ab. 45.

(*c*) Allen v. Gray, 1 Show. 50; Salk. 437; Comb. 131; Norwood v. Steven-

(*d*) 1 Show. 50.

(*e*) See Co. Litt. 32*a*, 33*b*.; Leigh v. Hanmer, 1 Leon. 53; Fenner's case, Owen, 25; Dyer, 368*b*.

latter, unless dissolved during the husband's life, being valid for the purpose of conferring dower, on the ground that the spiritual courts were not then permitted to avoid it (a): and the term marriage *de facto* is used in the same manner by Lord Holt, in *Hemming v. Price*. (b) It seems, therefore, that the distinction between marriage *de jure* and marriage *de facto*, which was sufficient to support the issue in the common-law courts, did not turn upon the mode of solemnization. In *Weld v. Chamberlayne* (c), where the issue was marriage or no marriage, it was assumed that proof of due solemnization was necessary.

The term marriage *de facto* has, however, occasionally been applied to marriages celebrated without the intervention of a priest; and according to some opinions, marriages of that description were sufficient for the purposes of many personal actions; and there are some cases which apparently sanction this view.

A case (d) at Nisi Prius has been cited, in which it is said that a Quaker marriage was held sufficient to support an action for criminal conversation; and the same point, with respect to an Anabaptist marriage, was decided as Nisi Prius by Mr. J. Denison, in a case (e) mentioned by Buller, who gives this explanation of it. "It has been doubted whether the ceremony must not be performed according to the rites of the church; but as this is an action against a wrong-doer and not a claim of right, it seems sufficient to prove the marriage according to any form of religion, as in the case of Anabaptists, Quakers, Jews, &c."

It is probable that these cases may have proceeded upon the distinction that, as against a wrong-doer, possession is sufficient for most purposes, without strict evidence of legal right: at the time when they occurred, it had not been decided that presumptive evidence of the marriage would not support this action. (f) Indeed, if marriages of this kind were looked upon merely as contracts *de presenti*, they still formed an indissoluble bond, and gave to the husband an inchoate right to the enjoyment of the woman's society; her seduction

(a) Co. Litt. 52a, 33b.: see Elliott v. Gurr, 2 Phill. 16.

(b) 12 Mod. 432.

(c) 2 Show. 300.

(d) 1 Hagg. Appendix 9, note. [A Quaker marriage was held at Nisi Prius sufficient to support such an action in

the case of *Deane v. Thomas*, 1 Mood. & M. 361.]

(e) *Woolston v. Scott*, Bull. N. P. 28: see Douglas, 166.

(f) *Morris v. Miller*, 4 Burr. 2057; 1 W. Bl. 632.

was, therefore, an injury to him, for which it might reasonably be held that he should have a remedy by action. Lord Hale, in a note, where he speaks of contracts *de presenti*, and of marriages imperfect by reason of nonage, puts a quære, “whether husband shall have trespass *de tali uxore abductâ*?”(a)

From a note of Lord Keeper Guilford (taken when at the bar), given in his life by North(b), it appears that in the time of Lord Hale, a special verdict was found on a Quaker's marriage. The circumstance is mentioned by Guilford, only as an instance of the partiality towards the popular and sectarian parties, which he imputed to Hale. “This was gross,” he says, “in favour of the worst of sectaries; for if the circumstances of a Quaker's marriage were stated in evidence, there could be no colour for a special verdict; for how was a marriage by a layman, without the liturgy, good within the acts that establish the liturgy? The slur, in such cases, used to be this: in evidence, a cohabitation, and owning the children, as man and wife, passeth, without entering into the question of right, that properly belongs to another jurisdiction. But here, though the right was debated, and could not be determined for the Quakers, yet a special verdict upon no point served to baffle the party that would take advantage of the nullity.” Burnet, in his life of Hale, mentions this case; and states that it was an action against a Quaker for debts owing by his wife before he married her; the defendant's counsel insisted that the marriage was not legal. “Hale,” he says, “declared that he was not willing, on his own opinion, to make their children bastards, and gave directions to the jury to find it special.” It does not appear whether the case proceeded further. Burnet says that Hale “considered marriage and succession as a right of nature, from which none ought to be barred, what mistake soever they might be under in the points of revealed religion;” and that “all marriages made according to the several persuasions of men ought to have their effects in law.” But the course which he took shows that he did not consider it to be settled that the law of England adopted these liberal opinions: or that it would, even as against the husband, sustain a marriage not duly solemnized.

In another case at Nisi Prius in 1661, a Quaker marriage is said to have been held valid in an action of ejectment.(c) These two

(a) Co. Litt. 33a, note 10.

(c) 1 Hagg. Appendix 9, note.

(b) Vol. 1, p. 126.

cases occurred at a time when some uncertainty may naturally have arisen from the various changes which the ecclesiastical laws had recently undergone.

It has been said, that marriage *de facto*, or in reputation (as amongst the Quakers), has been allowed by the temporal courts to be sufficient to give title to a personal estate, because the lawfulness of the marriage is not in issue, for that the issue is, whether a marriage was contracted or not, or whether the parties lived in a married state, the legality of it not coming in question. (a)

From the phrase of marriage *de facto*, or in reputation, here made use of, it may be inferred that this opinion alludes to cases where marriages not solemnized, so as to be valid according to the ecclesiastical law, have been established in the temporal courts by evidence of reputation in the manner mentioned in the above note of Lord Keeper Guilford. Proof of cohabitation, acknowledgment, and reputation, introducing a presumption that there had been in some way a legal marriage, would in many proceedings be sufficient. And by this species of indirect and presumptive evidence, the marriage might be held to be proved for the purpose of the action, without breaking in upon the general rule of law, that a solemnization *in facie ecclesiæ* was necessary to produce the civil effects of matrimony.

The opinion just quoted points at a distinction in this respect between real and personal property; and in *Haydon v. Gould*, a distinction was suggested between the case of the husband, and that of the wife and children. (b) The latter suggestion might possibly have been influenced by the doctrine of the canon law, according to which it seems that the issue of a void marriage might be legitimate, if the parents, or either of them, had entered into it *bonâ fide*, and without notice of its invalidity (c): if this was the reason, the invalidity of the marriage was admitted. This doctrine of the canon law was not, however, adopted in England, at least not by the temporal courts;

(a) Wood's Institutes of the Laws of England, p. 59.

(b) See also 1 Leon. 53.

(c) A case before the Court of Session, in 1811, led to a learned discussion on this branch of the canon law, and on the question whether it formed part of the law of Scotland. A woman privately married to one man, during his life

married another who was ignorant of the first marriage; the question was whether a child of the second marriage was legitimate, on account of the *bona fides* of the father. The opinions of the judges were equally divided. See Report of a Case of Legitimacy under a Putative Marriage, &c. By Robert Bell, Esq. Edinburgh, 1825.

and it is therefore more probable, that the notion of a marriage not duly solemnized, being valid with reference to some civil rights, though not valid with reference to others, originated in the difference between the species of evidence requisite in different forms of proceeding. The admissibility, and the effect of indirect evidence offered to prove a marriage, would depend upon the nature of the suit, and the situation of the parties. Thus, in one case it was held, that presumptive evidence could not be received to prove a marriage *inter vivos* (a), and at present such evidence, though sufficient for most purposes, is not allowed in actions by the husband for criminal conversation. (b) And where evidence of this kind is received, it has of course greater or less weight, according to the parties between whom the question arises. If the husband were defendant, as in the case before Hale, his simple acknowledgment would, *primâ facie*, be sufficient: some further proof would be required on a question of legitimacy; but still circumstantial evidence would be received, the children not being held to the strict proof, which is required of the husband when suing on a right founded on the marriage. This is probably what was meant in *Haydon v. Gould*, when it was said that the husband could not intitle himself by the *mere reputation of marriage*, though it might perhaps be different with the wife and children.

These considerations show, that cases in which the civil benefits of matrimony have been obtained in the temporal courts, through the medium of marriages not solemnized, so as to be valid according to the ecclesiastical law, are rather to be referred to the rules of evidence than to any difference between the law on this subject as administered by these tribunals. The authorities before adduced, which agree that, according to the common law, the civil effects of marriage did not follow without a solemnization *in facie ecclesiæ*, are decidedly inconsistent with the idea, that the validity of the marriage could be properly recognized by the temporal courts, unless a solemnization was either directly proved or inferred from circumstances. It does not, indeed, appear that any distinction was acknowledged between the temporal and spiritual law, with respect to marriage and legitimacy, excepting in the former not permitting a voidable marriage to be dissolved after the death of either of the parties, and not

(a) *Hervey v. Hervey*, cited *antè*, p. [375.]

(b) *Morris v. Miller*, 4 Burr. 2057; 1 W. Bl. 632.

allowing a subsequent marriage to legitimate the issue. With these exceptions, the law of the ecclesiastical courts was referred to as the proper criterion for the decision of such questions, of which it was admitted to have the sole original cognizance. In some cases (*e. g.* dower and general bastardy), those Courts were directly appealed to: in others, where the common-law courts undertook the inquiry, their rules of evidence might be different; but it is clear that they professed to acknowledge the same rules of law which prevailed in the spiritual courts: they received the sentences and certificates of those tribunals as conclusive authorities, when applying directly to the same question (*a*); and there could be no ground upon which the adjudication of one court could be adopted by another, unless it had also adopted the principles of law on which that adjudication was founded. It follows, that in whatever way the question of the validity of a marriage might occur, the ecclesiastical law was equally the guide; if the marriage was shown to be such as that law did not recognise, it could not be supported by the temporal courts; and, therefore, between whatever parties the point might arise, and whether it was tried in a suit for administration, in a real action, or in ejectment, the law applied to it was the same, though the different effect which the same evidence would have in different modes of proceeding would frequently lead to different results.

The doubts which have been entertained upon this subject appear to have arisen chiefly from the language commonly made use of by the civilians and canonists, and thence occasionally adopted in the common-law courts. According to the doctrines of the civil law, mutual consent alone was sufficient to constitute marriage (*b*); and the canon law followed the same notion to the extent of holding that the contract of the parties was the essence and substance of the matrimonial union, and it was therefore commonly styled *ipsum matrimonium*. It was held, that the *vinculum* was complete by the contract, and that it formed a marriage *in foro conscientiae*; and as the spiritual courts possessed the power of completing it, by enforcing solemnization, it had, for most of the purposes of their jurisdiction,

(*a*) See Lord Chief Justice De Grey's judgment in the Duchess of Kingston's case, State Trials, vol. xx. p. 537.

(*b*) The law of Rome, however, admitted of several species of marriage, and did not attach the same civil conse-

quences in respect of property to marriages constituted by consent alone as to the *solennes nuptiæ*. See Taylor's Civil Law, 266, *et seq.*, first edition. Brown's Civil Law, vol. i. p. 51. 71.

the same consequences during the lives of the parties, as a marriage duly solemnized. But although the contract was, in many of its practical effects, only slightly distinguished from marriage; and although for these reasons the term *ipsum matrimonium* was applied to it, yet that expression was not used as denoting that the contract alone constituted a complete and perfect marriage, equivalent to that which had been ratified by the observance of religious rites. It was the substance without the form. The passage extracted above, from the judgment in *Scrimshire v. Scrimshire*, shows that the phrase *ipsum matrimonium* was thus understood in our ecclesiastical courts. It is in the same sense that the expressions to be found in some other cases must be understood.

In *Collins v. Jessot* (a), Lord Holt is reported to have said, according to Salkeld, that a contract *per verba de præsenti* is a marriage, and not releaseable. The other reports of the case, which give his judgment at greater length, represent him to have said, that the contract amounts to an actual marriage, which the parties themselves cannot dissolve by release or mutual agreement; for it is as much a marriage in the sight of God, as if it had been *in facie ecclesiæ*: he added, that there was this difference, that if they cohabited before marriage *in facie ecclesiæ*, they were for that punishable by ecclesiastical censures; and that if, after such contract, either of them lay with another, they would punish such an offender as an adulterer. It is plain that this was not intended to imply that the contract constituted a legal marriage for all purposes; it is spoken of as a marriage in the sight of God, but as differing from a union legally complete in the most important particular.

In Wigmore's case (b), the same expression, that a contract *de præsenti* is a marriage, is attributed to Lord Holt, and was no doubt used in the same sense. He is said to have added, that the ecclesiastical courts could not punish for fornication after such a contract, which, however, is inconsistent with the last case, unless it refers to the distinction, that the censure was inflicted as a punishment for a contempt.

It is to be observed of both of these cases, that they did not involve the question. They were motions for prohibitions to the spiritual courts; and the only question, therefore, was, whether the matters

(a) 2 Salk. 437; 6 Mod. 155; Holt, 458. (b) 2 Salk. 437; Holt, 459.

were of ecclesiastical cognizance, as to which there could be no doubt. *Collins v. Jessot* was a suit on a matrimonial contract. Wigmore's case is said to have been a suit for alimony; but on this point the report is defective, as suits for alimony alone are not allowed: the suit is always for some other purpose, as incidental to which, alimony is granted. (a) But whatever the direct object of the suit may have been, it was plain that, as far as it depended on the question of marriage, the ecclesiastical court was the proper tribunal: and the observations of Holt on this point can therefore only be looked upon as dicta.

These two cases, and that of *Haydon v. Gould* (b), were referred to in *Rex v. Luffington* (c), where the question was, whether a marriage solemnized by a person, who at the time was erroneously supposed to be in orders, was sufficient to give the wife a settlement in the husband's parish. The question was similar to that put by Lord Stowell in *Hawke v. Corri* (d): the court does not appear to have expressed any opinion on the point, and declined to decide it on the ground that it was not positively stated whether the person who had performed the ceremony was, or was not, in holy orders. If they had supposed a contract to constitute a marriage, the inquiry into this fact would not have been material.

In *Lantour v. Teasdale* (e), the language of Lord Holt in the cases before referred was adopted; but in that case the marriage was solemnized by a priest, and the point, therefore, did not arise; and it did not come in question what species of marriage would confer the civil rights of dower, &c.

The elaborate and learned judgment of Lord Stowell, in the case of *Dalrymple v. Dalrymple*, requires more attentive consideration. His Lordship in that case took a view of the state of the general canon law of Europe previous to the Council of Trent. At that time he observed, that the canon law, "although, in conformity to the prevailing theological opinion, it revered marriage as a sacrament, still so far respected its natural and civil origin, as to consider that where the natural and civil contract was performed, it had the full essence of matrimony without the intervention of a priest: it had, even in that state, the character of a sacrament; for it is a misapprehension to suppose that this intervention was required as matter of

(a) See [p. 356. of vol. II. of this treatise,] and 2 Ves. Jun. 195.

(b) Cited *antè*, p. [380.]

(c) Burr. Sett. Cases, 232.

(d) *Antè*, [p. 377.]

(e) 3 Taunt. 830; 2 Marsh. 243.

necessity, even for that purpose, before the Council of Trent. It appears from the histories of the Council, as well as from many other authorities, that this was the state of the earlier law, till that Council passed its decree for the reformation of marriage. The consent of two parties expressed in words of present mutual acceptance constituted an actual and legal marriage, technically known by the name of *sponsalia per verba de præsenti*; improperly enough, because *sponsalia*, in the original and classical meaning of the word, are preliminary ceremonials of marriage; and, therefore, Brower justly observes, *jus pontificium nimis laxo significatu, imo etymologiâ invitâ, ipsas nuptias sponsalia appellavit.*" (a)

If this passage were understood as implying that a matrimonial union, formed by consent alone, was at the time referred to universally held to be equally complete with a marriage attended with ecclesiastical solemnities, it would certainly be giving it a meaning too wide, and probably beyond what the learned judge intended to express; for in a succeeding passage it is admitted, that different rules relative to their effect in point of legal consequences were applied to marriages of this description and to regular marriages, that every thing was presumed to be complete and consummated in substance, but not in ceremony; and the ceremony was enjoined to be undergone as matter of order. (b) The term legal marriages, which is here applied to matrimonial contracts, seems not to be used in an unqualified sense or as implying them to be in all respects complete.

It is certain, indeed, from Selden's dissertation on the point, that long before the Council of Trent, an opinion had been very generally, if not universally, adopted in the church, that though the contract of the parties formed the substance and *vinculum* of the marriage, the sacerdotal benediction was essential to render it complete. (c) Whether

(a) 2 Hagg. 64, 65.

(b) 2 Hagg. 65.

(c) See Selden, Ux. Eb. lib. ii. chap. 28: see also Ayliffe's Paregon, p. 364, and the Constitutions of Leo, and Gothofred's Annotations: Corp. Jur. Civ. ed. 1720, vol. ii. p. 620. The latter says, "Non est matrimonium cui sacrorum benedictio defuit." The doctrine is ascribed by Selden to an imitation of the Pagan and Jewish customs. It was commonly said to have been introduced into the church as matter of positive

enactment, by a decretal epistle of Pope Evaristus, in the second century, which was referred to as having established "incestum haberi connubium cui sacerdos non adfuisse consecrassetque illud." Ux. Eb. *ib. suprâ*. And though the authenticity of this epistle is questioned by Selden, its doctrine was adopted by several writers of authority whom he cites, and appears to have met with general reception; and whatever its origin may have been, it was quite natural that a notion which added dig-

the contract alone had the character of a sacrament, was a point upon which divines differed. (a) The decree of the Council of Trent contained a declaration of the previous validity of clandestine marriages. (b) This, however, applied more immediately to marriages had without the consent of parents, than to unions formed without spiritual intervention, which were technically designated by the term *sponsalia*: and if this declaration did comprise unsolemnized contracts, still, from the manner in which the decree was prepared and passed, its inconsistencies, the opposition it encountered, and the partial reception which it met with, it cannot be looked upon as conclusive evidence of the previous opinions of the church (c); and giving it the largest construction which its language admits of, it by no means shows that the former doctrine placed the contract or *sponsalia* on the same footing as marriage celebrated by a priest.

The distinction which exists is exemplified by the term *sponsalia de presenti*, which the canonists had introduced and applied to present contracts of marriage, as distinguished from marriages solemnized. The term was not known to the civil law: as by that law a present contract constituted a marriage, there could be no *sponsalia*, except those which referred to a future period; and the term *sponsalia de presenti* was therefore often objected to as a refinement invented by the canonists. (a) Thus, Swinburne says that the contract *de presenti* was in nature and substance rather matrimony than spousals; and that the canonists, though they invented the distinction, yet they oftentimes made no difference, or very little, between the nature and effects of spousals *de presenti*, and of matrimony solemnized and consummated. (d) But though the practical effect of the distinction was in many respects slight, its existence and acceptance amongst the canonists is proved by the technical description of unsolemnized contracts, under the term *sponsalia* (f), denoting a betrothment, or an inchoate and imperfect union; and this distinction became im-

nity to the clergy, and gave to the church an important branch of jurisdiction, should have been readily embraced.

(a) See Selden, *ub. sup.*: Sanchez de Matrimonio, lib. 2. disp. 6.

(b) See 3 Phill. 64.

(c) See Father Paul's History of the Council of Trent, book viii.

(d) 2 Hagg. 65; Heineccius, Elem. Jur. Nat. chap. ii. sec. 30.

(e) P. 3. 9.

(f) "Quemadmodum jure Cæsareo, uti etiam plerumque pontificio, sponsalia sunt ipsius matrimonii contractus seu stipulatio, et in consuetudinem illam vitæ repromissio, nuptive vero quæ a sponsalibus distinguuntur, solennes illæ ritus insequentes quibus matrimonium perficitur, celebraturque." Selden, Ux. Eb. lib. ii. ch. 1.

portant where the temporal law, as in England, attributed the civil effects of matrimony only to those marriages which were legally complete.

The important change introduced by the Council of Trent was in the prospective part of its decree, which declared that marriages, unless contracted in the presence of a priest and two witnesses, should be entirely void, thus destroying the effect of the contract; the former rule, that the consent of the parties was the substance of the marriage and completed the *vinculum*, was annulled: and hence, in the countries where the decree of that Council was received, the intervention of the priest became necessary, not only to the solemnization of marriage, but to the binding effect of matrimonial contracts or *sponsalia*. The apparent difference between Lord Stowell's judgment and other authorities, seems to arise from his Lordship giving the title of marriage to what was technically known under the name of *sponsalia*, and from his referring more to that which constituted the *vinculum*, than to that which was essential to make the marriage in all respects complete. In attributing to the Council of Trent the rule requiring the intervention of a priest (*a*), his Lordship can only be understood to refer to the decree having made that intervention necessary to form the *vinculum*, the opinion that it was necessary to form a perfect marriage having prevailed long before.

The decree of the Council of Trent not having been received in England, the binding effect of a contract entered into by the parties alone was still preserved here; and there is no reason to suppose that the doctrines promulgated by that Council could by any indirect influence have led our courts to establish the rule requiring a solemnization of marriage by a priest. It appears, indeed, from several of the authorities referred to above, that, previous to the date of that Council, that rule was understood to exist in England; its existence can only be ascribed to doctrines of the church originating at an earlier period.

Lord Stowell, in his judgment, proceeds to remark, that, "at the Reformation this country disclaimed, amongst other opinions of the Romish church, the doctrine of a sacrament in marriage, though still retaining the idea of its being of divine institution in its general origin; and on that account, as well as of the religious forms that were prescribed for its regular celebration, an holy estate, holy ma-

trimony; but it likewise retained those rules of the canon law which had their foundation, not in the sacrament, or in any religious view of the subject, but in the natural and civil contract of marriage. The ecclesiastical courts, therefore, which had the cognizance of matrimonial causes, enforced these rules; and amongst others, that rule which held an irregular marriage, constituted *per verba de presenti*, valid to the full extent of avoiding a subsequent regular marriage contracted with another person." (a) His Lordship afterwards adds, that "the common law certainly had scruples in applying the civil rights of dower and community of goods, and legitimacy, in the cases of these looser species of marriage." (b) These passages, though not alluding to cases such as those of *Haydon v. Gould*, and not explaining in detail the extent to which the religious view of the nature of marriage continued to influence the proceedings of our ecclesiastical courts, are not in substance inconsistent with the observations here offered. It is affirmed only that the contract had the effect of vitiating a subsequent marriage with another, and the proposition, that it did not confer the civil rights which flow from a legal marriage, is not disputed.

It will be observed, that in the passage last cited from Lord Stowell's judgment, as well as in the passages referred to in *Swinburne* (c), the rule excluding unsolemnized contracts from the civil privileges of legal matrimony is attributed to the doctrines of the common law. It is clear, however, that the common law, if by that be meant the law administered by the temporal courts, interfered no further than to require a lawful marriage as the foundation of civil rights, leaving the question what was a lawful marriage to be determined according to the law administered by the ecclesiastical courts: if a woman united to a man by contract only, without solemnization *in facie ecclesiæ*, did not recover dower, it was only because the ecclesiastical courts refused to acknowledge such an union as *legitimum matrimonium*. It was the same with respect to legitimacy, which depended in general on the bishop's certificate. There was certainly no rule by which the civil tribunals required any marriage ceremonies, except those which the ecclesiastical courts considered essential to constitute lawful matrimony.

It will have been noticed that the judgment referred to, in speaking of the sentences enforcing solemnization in pursuance of contracts, mentions that this solemnization was enjoined as matter of

(a) 2 Hagg. 67.

(b) Ibid. 68.

(c) *Anté*, p. [379.]

order. It is not, however, to be inferred that the solemnization was decreed merely for the sake of public order and decorum: for it is known that these sentences were not the result of any species of public prosecution, but that they were made in suits instituted by one of the contracting parties, desiring the benefit of the contract, and for that purpose calling on the other party to proceed to solemnization. The common practice of instituting suits for this object would be quite inexplicable, unless the authorities be correct in stating that the solemnization was essential to confer the privileges of marriage.

The various authorities here adduced establish the proposition, that according to the law administered in England before the Marriage Act, a matrimonial contract *de presenti* was essentially distinct from a marriage solemnized by a person in holy orders; that it did not confer on the woman the right to dower; on the man the right to the woman's property; or on the issue the rights of legitimacy; and that it did not render a subsequent marriage with a third person *ipso facto* void at law, though it formed a ground for a sentence annulling it. They seem also to show, that, according to the ecclesiastical law, the contract did not give any right, except to call for a performance of it by actual solemnization, not justifying cohabitation, and not conferring conjugal rights; and that at the common law it had no effect, though in cases where the parties cohabited, and were reputed to be man and wife, this might be sufficient evidence for the purposes of some actions in which strict proof was not required.(a)

(a) According to some of the opinions given in evidence in *Dalrymple v. Dalrymple*, 2 Hagg. Appendix, p. 17, *et seq.*, it seems, that in Scotland solemnization of marriage *in facie ecclesie* was indispensable previously to the Reformation, that some relaxation of this rule had been introduced by the statute 1503, ch. 77, by which marriage by habit and repute was made sufficient to intitle the widow to her terce; and that the law was gradually changed by the new doctrines introduced at the Reformation. For some time it continued to be the practice to compel a party who had entered into a contract of marriage to complete it by solemnization; this had been abandoned, and other modes of

constituting marriage were admitted; but upon the question what mode was sufficient, the greatest variety of opinion existed, together with some fluctuation of decision, until the law was settled by the cases of *Dalrymple v. Dalrymple*, and *M'Adam v. Walker*. Some thought that a mutual declaration of present consent in private, without consummation, constituted a marriage; but it was admitted that the case of *M'Adam v. Walker* was the first in which such a marriage was established. Others were of opinion, that if there were no cohabitation or carnal intercourse, contract or consent alone would not be sufficient, and that either party might resile, unless there had been some species of celebra-

[It has lately been decided by the House of Lords in the case of the Queen *v.* Millis(*a*), and by the Court of Exchequer in that of Catherwood *v.* Caslon(*b*), that a contract of marriage *per verba de presenti*, although indissoluble between the parties themselves, affording to either of the contracting parties by application to the spiritual court the power of compelling the solemnization of an actual marriage, never constituted a full and complete marriage in itself, unless solemnized by a person in holy orders.]

The marriages of Jews and Quakers are excepted out of the operation of the first Marriage Act, as well as of that now in force.

tion, though without defining what form was to be observed, and allowing that the assistance of a clergyman might be dispensed with. It was said (with singular vagueness) that, *rebus integris*, marriage could "only be constituted by a consent adhibited in the presence of a clergyman, or in some other solemn mode equivalent to actual celebration." 2 Hagg. Appendix, 132: the practice in Gretna Green marriages, of going through the form of the marriage service, was probably intended to conform to this opinion. The distinction between contracts *de presenti* and contracts *de futuro* was not admitted by all; but it was generally agreed, that a contract or promise, followed by a *copula*, amounted to marriage; and some, it seems, thought that the law of Scotland would look with equal indulgence on a *copula* antecedent to the contract. 2 Hagg. 97, Appendix, 140. On the other hand, it was thought by some that a contract, or promise *cum copulâ*, would be defeated by a subsequent regular marriage between one of the parties and another person. The difference between the laws of England and Scotland, in this respect, may be ascribed partly to the different courses which the Reformation took in the two countries, and perhaps partly to the jurisprudence of the latter having been more influenced by the civil law. In Scotland, the abolition of episcopacy introduced a different view of the nature of the sacerdotal office; the doctrine of the distinct and indelible character of

the priesthood, and of the authority entrusted to them by a divine commission, derived through successive consecrations and ordinations from the apostolic ages, was not retained: and this, together with the change of the ecclesiastical jurisdiction, naturally led to the idea that the ministration of a clergyman could give no peculiar efficacy to a ceremony; and the opinion that marriage was merely a civil contract ultimately prevailed. In England, the church departed less widely from its ancient doctrines; episcopal jurisdiction and ordination were retained, and the doctrine of the spiritual nature of marriage was never lost sight of. It is probably from the same cause, that another important distinction between the laws of the two countries has arisen: the Scotch law allowing divorces *à vinculo*, while that of England adheres to the doctrine of the indissolubility of marriage, a doctrine founded on the religious view of the subject. [See, as to marriages in Scotland, the cases of Stewart *v.* Menzies, 2 Rob. App. C. Scotland, 547: Reid *v.* Laing, 1 Shaw, Scotch Appeals, 440: Robertson *v.* Crawford, 9 Beav. 102: Macneil *v.* Macgregor, 1 Dow & C. 208: Hoggan *v.* Cragie, Rob. & Maclean, 943: Reg. *v.* Dent, 1 Car. & K. 97: and the 4 & 5 W. 4. c. 28.]

[(*a*) 10 Cl. & F. 534; 7 Jur. 911. 982; 8 Jur. 717.]

[(*b*) 13 Mees. & W. 261; 13 Law J. N. S. Ex. 1076; 8 Jur. 1076: see, however, a discussion of the cases in the Law Review, vol. 2. p. 136.]

The exception is confined to cases where both the parties are Jews or Quakers. (a)

With respect to the Jews, it appears that their marriages have at all times been celebrated according to the rites of their own religion, and the legal validity of such marriages has been recognized in various cases as well before (b) as since (c) the Marriage Act. And questions arising upon them are determined by the Jewish law, which is ascertained in the same manner as a foreign law, by the testimony of its professors. (d)

This exception to the general law has probably arisen from the peculiarities attending the state of the Jewish nation in England; having always been looked upon as a distinct people, and having for a long time been treated rather as aliens than as native subjects. During the earlier periods of their residence in England, they were so far severed from the rest of the inhabitants as to be subjected to a distinct judicature, regulated to a certain extent by their own laws. (e)

The cases of *Lindo v. Belisario*, and *Goldsmid v. Bromer*, show, that whatever may have been the origin of the exemption of Jewish marriages from the general law, it has not arisen from an opinion, that a present contract alone constituted a marriage, and that the form of solemnization was therefore immaterial. In each of those cases, it was clear that what had passed amounted to a contract *per verba de presenti*, and that it was looked on by the parties as an actual marriage: in the latter case consummation had followed. The substance of the matrimonial contract was complete; but in

(a) *Jones v. Robinson*, 2 Phill. 285. [See vol. I. p. 4. of this treatise.]

(b) *Andreas v. Andreas*, 1 Hagg. Appendix, 9, note: *La Costa v. Villa Real*, 1 Hagg. 242, note: see *Franks v. Martin*, 5 Bro. P. C. 151. 155.

(c) *D'Aguilar v. D'Aguilar*, 1 Hagg. 134, note: *Vigevena v. Alvarez*, *ibid.* Appendix, 7, note: *Lindo v. Belisario*, 1 Hagg. 216: *Goldsmid v. Bromer*, *ibid.* 324: *Horn v. Noel*, 1 Campb. 61: [*Moss v. Smith*, 1 Man. & G. 229: *D'Aguilar v. D'Aguilar*, 1 Hagg. Eccl. R. 773.]

(d) *Lindo v. Belisario*: *Goldsmid v. Bromer*, *ub. supra*.

(e) *Mad. Hist. Exch.* chap. 7. sec. 3. See 2 Hagg. 217, note: 2 Swan. 505,

note, and *Prynne's Short Demurrer to the Jews'* long discontinued barred re-mitter into England. It seems that the wife's right to dower, and the descent of lands, were governed by the Jewish law. *Prynne* gives a writ to the justices of the Jews, in 23 Hen. 3., directing them to put the two sons of one Samuel, a deceased Jew, into possession of his lands and chattels, on payment of a fine, "*salvo uxori ejusdem Samuelis rationabili dote sua, secundum legem et consuetudinem Judæorum*," p. 27. By letters patent in 54 Hen. 3., the King confirmed to a Jew a house in London, devised to him by his father by a will, "*secundum consuetudinem Judaismi nostri*," p. 65.

each of these cases, the sentence of nullity was pronounced, on the ground of the ceremony being imperfect according to the Jewish law. These marriages, therefore, are not supported as contracts: a compliance with the Jewish ceremonials being essential to their validity.

It is less easy to ascertain what principles of law are now to be applied to the marriages of Quakers. The question must, in a great measure, depend on the state of the law previous to the statute 26 Geo. 2., with reference to marriages of protestant dissenters, celebrated in their own congregations: and it does not appear that there has been any solemn decision on this point, excepting in the case of *Haydon v. Gould*.

In a case in *Levinz (a)*, which occurred a few years after the Toleration Act, it appeared, that a marriage between two protestant dissenters (who had taken the oaths, and made the declaration according to that act), had been celebrated in their own congregation: they had afterwards been libelled against in the ecclesiastical court, and pleaded this matter by way of defence; but the court refused to admit it. A motion was then made for a prohibition, and *Levinz* says that it was agreed that a prohibition should go, and that the plaintiff should declare on the prohibition, so that upon a demurrer the law might be tried. It does not appear whether this case received an ultimate decision. (*b*)

It was followed by the case of *Haydon v. Gould*, which tends strongly to show, that the question raised in *Hutchinson v. Brookebanke* was not settled in favour of the validity of dissenters' marriages. It does not, indeed, appear whether the parties in *Haydon v. Gould* had taken the oaths and subscribed the declaration required by the Toleration Acts: but the case seems always to have been looked upon as a decision applicable to such marriages generally. Thus it is said, in one statement of that case, that "the act of 7 & 8 Will. 3. chap. 35, seems to put this matter out of all doubt, which lays a penalty on clergymen in orders, if they celebrate marriage in a clandestine manner; for if the same privileges attended marriages solemnized by the dissenters, as those celebrated according to the church of England, how easily would that act be evaded, or rather rendered of no effect. There would then be no occasion for licence or banns, for making oath, or giving security that there were no legal

(a) *Hutchinson v. Brookebanke*, 3 (b) See 1 Hagg. Appendix, 7.
Lev. 376.

impediments; but every one might do what was right in his own eyes, who should get himself admitted of a dissenting congregation." (a)

In the case of *Green v. Green* (b), a Quaker marriage seems to have been thought not sufficient to intitle to the restitution of conjugal rights. In another case (c), in the year 1730, the libel pleaded a marriage had in the manner usually observed amongst the Quakers, by public declaration at their monthly meetings, and that notwithstanding the defendant had refused to *solemnize* and consummate. The defendant admitted the contract, alleging it to be conditional. There were two sentences against him in the consistory of Durham, and afterwards at York. It seems that there was an appeal to the delegates, the result of which does not appear; but as far as the case went, this species of marriage was treated as standing only on the footing of a contract.

The argument which has been drawn from the Toleration Act certainly receives some countenance from the judgment of Sir J. Nicholl in the case of *Kemp v. Wickes*, where the question was, whether baptism by a dissenting minister was sufficient to intitle the party to the rites of burial according to the forms of the church. It was decided, that baptism by a layman would have been sufficient for this purpose; and it was not, therefore, necessary to consider whether the performance of the ceremony by a dissenting minister would be looked upon in law as different from a performance of it by a layman. But Sir J. Nicholl appeared to think, that this question might be materially affected by the Toleration Act, and thought that dissenting ministers being now legalized, it could not be said that rites and ceremonies performed by them were not such as the law could recognize in any court of justice. (d)

On the other hand, it is to be observed, that it was plainly not the meaning of the Toleration Act to confer on dissenters any thing beyond an immunity from the penalties to which they were before subjected: as Lord Hardwicke observes, it gives no new right, but only an exemption from the penal laws. (e) It would therefore be difficult to maintain that this act could give to the religious ceremonies of dissenters any additional efficacy in conferring the civil

(a) 2 Burn's Ecclesiastical Law, 472: see also Browne's Civil Law, vol. 1. p. 75 n.

(b) 1 Hagg. Appendix, 9, note.

(c) *Dodgson v. Haswell*, *ibid.*

(d) Judgment of Sir J. Nicholl, upon the admission of articles in *Kemp v. Wickes*, London, 1810; Butterworth, see p. 36.

(e) 2 Swan. 490, note: see 3 Mer. 405.

rights of marriage, though it might perhaps form a ground for contending, as in *Hutchinson v. Brookebanke*, that such marriages and cohabitation after them were no longer punishable. The spiritual court, however, in that case refused, as it seems, to admit the plea, even for the purpose of defence, and the Irish statute 11 Geo. 2. chap. 10, sec. 3 (a), proves that the Toleration Act in that country (which corresponds with the English Act) was not considered to justify the cohabitation of dissenters married according to their own forms. The cases of *Haydon v. Gould*, *Green v. Green*, and *Haswell v. Dodgson*, are much opposed to the notion, that such marriages had acquired for other purposes any force beyond that of contracts. In *Collins v. Jessot*, and *Wigmore's case*, they are treated as contracts only. The statute 7 & 8 Will. 3. (passed shortly after the case of *Hutchinson v. Brookebanke*) indicates that at that time their validity was not acknowledged: the subsequent statute 10 Anne, c. 19, in omitting to notice any marriages except those solemnized by priests, raises a similar inference. And the opinions extracted above, from *Wood* and *Buller*, only speak of such marriages as being good for the purpose of actions where their legality did not come in question.

The Irish statute 21 & 22 Geo. 3. chap. 25 (b), was in form declaratory, but it is clear that it in fact introduced a new law. This appears from the previous statute 11 Geo. 2. A learned writer before referred to, who states the general matrimonial law of Ireland to require the intervention of a priest, considers, indeed, that the marriages of dissenters had, before the statute 21 & 22 Geo 3., acquired validity for some purposes. He states (c), that such marriages, if solemnized according to their own rites, and if both parties were of the same persuasion, were good to all civil effects; for instance, to support an ejectment where legitimacy came in question, or an action for criminal conversation; but that, if they came to intitle themselves to any rights in the ecclesiastical courts, as to administration, they must prove a marriage according to the ecclesiastical law: for the latter point he refers to *Haydon v. Gould*. It does not, however, appear, whether this partial exception to the general law was supposed to have originated with the Toleration Act, or upon what foundation it stood. It may probably be referred to those distinctions in the rules of evidence which have been alluded to above. Upon any other principle, it would be difficult to account for the distinction sup-

(a) *Antè*, p. [382.]

(b) *Antè*, p. [382.]

(c) *Browne's Civil Law*, vol. 1. p. 75. *note*.

posed between the species of marriage sufficient for the purposes of an ejectment, and that required by the law of the ecclesiastical courts for the purposes of their proceedings. The question of legitimacy in a real action would necessarily depend directly on the rules of the spiritual law; and it would have been singularly anomalous, if there had been one law of legitimacy in real actions, and another in ejectment.

These remarks refer to the marriages of dissenters in general before the Marriage Act; but some of the views which might then have been adopted with reference to other sects could not be applied to the case of the Quakers. Their mode of celebrating, or rather of declaring a marriage, partaking scarcely, if at all, of the nature of a religious ceremony, would have rendered it more difficult to distinguish their marriages from mere contracts. And if the opinion hinted at in *Kemp v. Wickes* (a), that the Toleration Act gave a new character to dissenting ministers, could be carried to the extent of contending that it placed religious ceremonies performed by them on the same footing, in point of legal effect, with those performed by persons in orders, this argument could not be urged in support of the marriages of Quakers, as their practice does not admit any distinct minister. For the same reason, the terms of the Irish statutes 11 Geo. 2. chap. 10, and 21 & 22 Geo. 3. chap. 25, do not in strictness include Quakers: they speak only of matrimonial contracts entered into before dissenting ministers or teachers, and of marriages solemnized by them.

But another view of this question, as it regards the present state of the law, arises from the clause introduced into the first Marriage Act, and repealed in the subsequent acts, by which the marriages of Quakers are excepted. This clause may, perhaps, be looked upon as a legislative recognition of the validity of these marriages, indirectly legalizing them; and there are some expressions to be found favourable to this view. (b) If, however, these marriages were previously invalid, or valid only to a certain extent, it is not very obvious that additional efficacy could be given to them by a statute declaring that nothing therein contained shall extend to them. If this had been the design of the legislature, different expressions would have been used; the exception was, no doubt, made from its being known that the scrupulous adherence of the Quakers to their own tenets, precluded the expectation of their conforming to the regulations of the Act; and the intention most probably was to leave their marriages in their

(a) *Antè*, p. [401.] (b) See 1 Hagg. App. 8; 2 Phil. 285; 2 Burn's Eccl. L. 486.

previous condition to be judged of by the previous law, and with that qualified and doubtful validity which they were then considered to possess. Thus it has been seen that, according to some opinions, these marriages were at that time valid for some purposes only : and if those opinions were correct, it would be very difficult to maintain that the Marriage Act has rendered them valid for any other purpose.

The weight of the authorities seems, however, to show, that although persons claiming under these marriages might succeed by means of indirect and presumptive evidence, yet that the law did not recognize their validity, and that their only legal effect was derived from their being contracts *de presenti*, which might be enforced by the spiritual courts, till that jurisdiction was taken away by the Marriage Act. If this conclusion be correct, it will follow that the Act, unless it has legalized the marriages of Quakers, has deprived them of that effect which they previously had. It is plain, however, that it was not intended to render them less effectual than before : and this may be urged in favour of the opinion, that the Act has operated to confirm them.

Since the Act, the validity of the marriages of Quakers does not appear to have come in question, at least not in any reported case. [(a)] This has probably arisen from their prudent and peaceful habits, and perhaps partly from the circumstance of its not being either the interest of any members of their own families, or the disposition of the crown, to raise the objection. If the law on this subject should not be fixed by a legislative measure, and if the question should call for a judicial decision, the Courts would no doubt be strongly inclined, upon obvious principles of reason and justice, as well as from the number and respectability of the persons interested, to support these marriages, whatever difficulty there may be in finding grounds upon which their validity can be reconciled with the former law : perhaps the least objectionable mode of sustaining them would be to consider the saving clause in the Marriage Act as a recognition precluding the inquiry into their former condition.

Supposing the decision on the general question of the legality of the marriages of Quakers to be in their favour, the ground on which that decision may proceed will influence some other questions which may arise. If it should proceed upon the notion that they had before the Act acquired validity for some purposes, it will, upon that supposition, be at least doubtful whether they can now be held to confer all the

[(a) A case has lately occurred at Nisi Prius, see p. 386. *antè*.]

rights of marriage. If the decision should proceed upon the argument deduced from the Toleration Act, it will be a question whether the parties must not be shown to have brought themselves within that Act, by subscribing the declaration which it requires. (a) It is also at present uncertain what may be decided as to the particular mode in which a marriage may be constituted between Quakers, whether the mere contract or engagement of the parties, without public ceremonial or parental consent, be sufficient, or whether an observance of any forms be essential; nor does there seem to be any certain rule for determining what is the proper form, or what degree of departure from it may be fatal: varieties of opinion and practice may exist at different times, and in different congregations: and there is not, as amongst the Jews, any ancient and settled law, which can be referred to for the decision of such questions. (b)

By the statute 3 Geo. 4. c. 75, marriages which had been solemnized by license obtained without the proper consent, and which

(a) The statute 52 Geo. 3. c. 155, dispenses with the oath and declaration as to Dissenters in general, and extends the benefit of the Toleration Act to persons preaching at or resorting to meeting-houses duly registered. But this statute does not extend to Quakers.

(b) The expediency of settling the doubts relative to the marriages of Quakers, by a declaratory law, is understood to have been intimated by a high authority in the House of Lords, during the last session of Parliament [1826]. There are some other parts of the law of marriage in this kingdom, to which the attention of the legislature might also be beneficially directed. With respect to Jewish marriages, it is singular that a law, by which a marriage may be annulled on proof that a person has eaten meats forbidden to that nation, stirred a fire, or snuffed candles on a Saturday, 1 Hagg. 324, should have been so long allowed to exist; and few can doubt that our courts ought to be relieved from the necessity of administering such a law. With respect to Scotland, whatever difference of opinion there may be as to

the policy of controlling the choice of minors, it must be admitted by all, that the variety and uncertainty of the evidence by which marriage may in that country be established, is calculated to produce great insecurity and confusion. And the difference between the law of divorce, as administered in Scotland and in England, has introduced much uncertainty, and some strange anomalies. See *Lolley's case*, Russ. and Ryan's Crown Cases, p. 237, and *Tovey v. Lindsey*, 1 Dow, 117. [See also *Conway*, otherwise *Beazley v. Beazley*, 3 Hagg. Eccl. R. 639: *Warrender v. Warrender*, 9 Bligh, N. R. 89; 2 Cl. & F. 488. As to the effect of a foreign divorce upon a marriage solemnized in England, see *McCarthy v. Decaix*, 2 Russ. & M. 615.] In Ireland, the law by which the validity of a marriage depends, in many cases, on the religion of the parties, besides opening a door to the most infamous frauds, occasions frequently similar uncertainty, from the question turning on a point, as to which there must often be an absence of clear proof. See 2 Addams, 471, and Irish T. R. 259.

were therefore void under the statute 26 Geo. 2. c. 33, were rendered valid in cases where the parties had continued to cohabit (a) until the death of one of them, or until the passing of the Act, or where they had only discontinued their cohabitation for the purpose of or during the pendency of any proceedings touching the validity of such marriage. The Act excepted cases where the invalidity of the marriage had been declared by any Court of competent jurisdiction, or established upon the trial of any issue, or acted upon by any judgments, decrees, or orders of Court, or where either of the parties had, during the life of the other, lawfully intermarried with another person [(b)]; and it provided that where any property, real or personal, had been possessed, or any title of honour enjoyed, on the ground of the invalidity of any such marriage, the right and interest in such property, or title of honour, should not be affected. These retrospective provisions did not include marriages by banns, and, therefore, marriages which were invalid under the former law, from the banns not having been duly published, are still void. (c)

The statute 3 Geo. 4. c. 75, also contained provisions with respect to future marriages. These [with the exception of the retrospective clause (d)], together with the old Marriage Act, 26 Geo. 2. c. 33, have been repealed by the late Act 4 Geo. 4. c. 76, which [with the 6 & 7 W. 4. c. 85, explained and amended by 1 Vic. c. 22.] comprises the enactments that now regulate marriages in this country. [(e)]

The first section of this statute repeals the former Acts; the second prescribes the mode of publishing banns, and of performing the ceremony, nearly in the same terms as the old Act. The third, fourth, fifth, and sixth sections enable the bishop of the diocese, with the consent of the patron and incumbent, to authorize the publication of banns, and the solemnization of marriage, in other chapels; and the laws respecting registers are extended to such chapels. The next two sections are borrowed from the old Act: the seventh pro-

(a) See *Bridgwater v. Crutchley*, 1 Addams, 473. [As to what has been held to be cohabitation under this act, see *King v. Jansom*, 3 Add. 277; *Poole v. Poole*, 2 Crompt. & Jer. 66; 2 Tyr. 77; *Younge Eq. Ex.* 331.]

[(b)] This section is retrospective only: *Rex v. Inhab. of St. John Delpike*, 2 B. & Ad. 226.]

(c) *Stanhope v. Baldwin*, 1 Addams, 93.

[(d)] *Rose v. Blakemore*, *Ryan & Mood. N. P.* 383.]

[(e)] So much of the 4 G. 4. c. 76, as relates to registration has been repealed by the 6 & 7 W. 4. c. 86. sec. 1: and see 7 W. 4. c. 1. sec. 1.]

vides that seven days' notice of the names of the parties, their places of abode, and the time of their residence, shall be given to the minister before publication of banns; and the eighth exempts the minister from punishment for marrying minors without the consent of parents or guardians, unless with notice of their dissent. (a) By the ninth section, if the marriage be not had within three months after the complete publication of banns, they must be republished in the same manner. By the tenth, licenses are only to be granted for marrying where one of the parties has resided for fifteen days. By the eleventh section, if a caveat be entered against the grant of a license, it is not to be granted, until the matter has been examined by the judge out of whose office it is to issue. The twelfth section enacts, that parishes not having any church or chapel, and extra parochial places, not having chapels in which banns may be published, shall be deemed to belong to any adjoining parish or chapelry.

The thirteenth section provides, that when a church or chapel is disused, from being under repair, or from being taken down to be rebuilt, the banns may be published in any place within the parish or chapelry licensed by the bishop for the performance of divine service, or in the church or chapel of any adjoining parish or chapelry; where no place is so licensed, the marriage may be solemnized in such adjoining church or chapel; and marriages heretofore solemnized in other places within parishes or chapelries, on account of the church or chapel being under repair or taken down to be rebuilt, are not on that account to be questioned. (b).

The fourteenth section enacts, that previous to the grant of a license, one of the parties shall swear to his or her belief that there is no lawful impediment, and to their residence; and also, where either of the parties, not being a widow or widower, is under the age of twenty-one, that the consent of the persons whose consent is required by that Act has been obtained; but it is provided, that if there shall be no such person or persons having authority to give such consent, then, upon oath made to that effect by the party requiring such license, it shall be lawful to grant such license notwithstanding the want of any such consent.

(a) Formerly the minister was liable to censure in the ecclesiastical courts for marrying without the consent of parents, though ignorant of their dissent. *Bridgen's case*, 2 Burn. Eccl. Law, 432.

(b) See *Stallwood v. Tredger*, 2 Phill. 287, and stat. 5 Geo. 4. c. 72, cited *post*.

By the fifteenth section, no bond or other security is to be required on granting licenses. The sixteenth declares that the father, if living, of any minor, not being a widower or widow, or if the father shall be dead, the guardian or guardians of the person of the party lawfully appointed, or one of them; and if none, then the mother of such party, if unmarried; and if there shall be no mother unmarried, then the guardian or guardians of the person appointed by the Court of Chancery, if any, or one of them, shall have authority to give consent to the marriage; and such consent is thereby required, unless there shall be no person authorized to give such consent. [(a)]

The seventeenth section provides that where the father is *non compos mentis*, or where the guardian or mother, whose consent is requisite, is *non compos mentis*, or beyond the seas, or unreasonably refuses to consent, the Court of Chancery may authorise the marriage. This clause corresponds with that in the old Act, but is extended to the case of the father being lunatic. [(b)]

The eighteenth section provides for the oath of office to be taken, and the security to be given by the surrogates deputed to grant licenses: by the nineteenth, licenses are to be in force for three months only; and by the twentieth, the power of the Archbishop of Canterbury to grant special licenses is preserved. The twenty-first makes it felony, punishable by fourteen years' transportation, knowingly and wilfully to solemnize matrimony in any other place than a church or chapel, wherein banns may be lawfully published, or at any other time than between the hours of eight and twelve in the forenoon (unless by special license), or without due publication of banns or license; and the same punishment is enacted for persons falsely pretending to be in holy orders, who shall solemnize matrimony according to the rites of the church of England: prosecutions under this clause are to be commenced within three years.

The twenty-second section declares, that if any person shall knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein banns may be lawfully published (unless by special license), or shall knowingly and wilfully intermarry without due publication of banns or license from a person having authority to

[(a) This section is directory only: case except where he is *non compos*
Rex v. Inhab. of Birmingham, 8 B. & C. *mentis*, *ex parte* J. C., 3 M. & C. 471;
29.] *ex parte* Colegrave, 7 Law J. N. S. Chan.

[(b) This section does not dispense 236.]
with the consent of the father in any

grant the same, or shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void to all intents and purposes whatsoever.

By the twenty-third section it is enacted, that where any valid marriage of a minor by license shall be procured by the false oath of either party, as to the matters required to be sworn to, such party wilfully and knowingly so swearing; or if any valid marriage of a minor by banns shall be procured by a party thereto, knowing that the minor had a parent or guardian then living, and that such marriage was had without the consent of such parent or guardian, and knowing that banns had not been duly published, and having knowingly caused or procured the undue publication of banns, the Attorney or Solicitor-General may file an information in the Court of Chancery or Exchequer at the relation of a parent or guardian of the minor, whose consent has not been given to such marriage, and who shall be responsible for the costs, to sue for a forfeiture of all estate, right, title, and interest in any property which hath accrued, or shall accrue, to the party so offending, by force of such marriage: and such Court shall have power in such suit to declare such forfeiture, and thereupon to order and direct that all such estate, right, title, and interest in any property as shall then have accrued, or shall thereafter accrue, to such offending party by force of such marriage, shall be secured under the direction of such Court for the benefit of the innocent party, or of the issue of the marriage, or of any of them, in such manner as the said Court shall think fit, for the purpose of preventing the offending party from deriving any interest in real or personal estate, or pecuniary benefits from such marriage; and if both the parties so contracting marriage shall, in the judgment of the Court, be guilty of any such offence as aforesaid, it shall be lawful for the said Court to settle and secure such property, or any part thereof, immediately for the benefit of the issue of the marriage, subject to provisions for the offending parties by way of maintenance, or otherwise, as the said Court, under the particular circumstances of the case, shall think reasonable, regard being had to the benefit of the issue of the marriage during the lives of their parents, and of the issue of the parties respectively by any future marriage, or of the parties themselves, in case either of them shall survive the other. Before filing such information, affidavit must be made of the circumstances, and that the relator had not discovered the marriage more than three months before his application to the

Attorney or Solicitor-General. By the twenty-fourth section, all agreements, settlements, or deeds upon such marriages are made void so far as they may be inconsistent with the directions given by such Courts; and by the twenty-fifth section, such informations must be filed within a year from the solemnization of the marriage. [(a)]

By the twenty-sixth section, proof of the residence of the parties is not required after the marriage, and evidence to prove non-residence shall not be received in any suit touching the validity of the marriage. The twenty-seventh section repeats the clause in the old Act, providing that no suit shall be had to compel celebration of marriage *in facie ecclesiæ*, by reason of any contract, whether *per verba de præ-senti*, or *per verba de futuro*. The twenty-eighth provides, that marriages shall be had in the presence of two witnesses, and the register attested by them and by the minister: and the twenty-ninth makes it felony to insert in the register-book any false entry relating to a marriage; or to make, alter, forge, or counterfeit any such entry, or any license of marriage, or to utter them as true, or to destroy any register-book, or any part thereof, with intent to avoid any marriage, or to subject any person to the penalties of the Act. The thirtieth section excepts the marriages of the Royal Family, and the thirty-first excepts the marriages of Quakers and Jews. By the last section the Act is only to extend to England.

The consent required to the marriage of a minor by this Act is the same as under the old Marriage Act, excepting in cases where the minor is without a legal parent or guardian, and where there is therefore no person having authority to consent. In such cases the Ecclesiastical Judge, or the surrogate, has power to grant the license of his own authority. But a guardian may, nevertheless, still be appointed by the Court of Chancery, for the purpose of consenting, and this has been done in some cases which have occurred since the Act.

The guardian "lawfully appointed," is considered to mean only a guardian appointed by the father under the statute 12 Car. 2. c. 24 (b): and consent to a marriage can therefore not be given by a guardian of any of the other kinds known to the law, excepting a guardian appointed by the Court of Chancery; and although the latter would, in general, supersede the authority of the mother, yet, under the ex-

[(a) See as to this section, vol. I. (b) See *Horner v. Horner*, 1 Hagg. p. 6. of this treatise, and Att.-Gen. v. 355. Lucas, 12 Jur. 534.]

press terms of the Act, his power with respect to marriage does not arise so long as the mother is living and unmarried.

The most important alteration in the law by the late statute, is the repeal of the clause in the statute 26 Geo. 2. c. 33, declaring null and void marriages not solemnized in the mode there prescribed, and the substitution of the twenty-second section in its place. By this clause the nullity is confined to marriages where the parties are privy to the irregularity; and it appears, as well by the language of this as of the twenty-third section, that in order to render it void, *both* parties must be affected with the fraud. If the marriage, though not conformable to the mode prescribed, be *bonâ fide* on the part of one or both of the parties, it will be good if solemnized so that it would have been valid before the old Marriage Act.

The first cause of nullity is marrying, knowingly and wilfully, in a place not a church or chapel qualified for the publication of banns. [(a)]

The law, with respect to the place of solemnization, has been extended by two subsequent Acts. The stat. 5 Geo. 4. c. 32, enacts, that marriages which had been, or should be, solemnized in any place within the limits of any parish or chapelry, licensed by the bishop for the performance of divine service during the repair or rebuilding of the church or chapel, in which marriages had been usually solemnized; or if no such place should be so licensed, then in a church or chapel of any adjoining parish or chapelry, in which banns are usually proclaimed, whether by banns lawfully published in such church or chapel, or by license lawfully granted, should not on that account be questioned.

The statute 6 Geo. 4. c. 92, confirms all marriages which had been solemnized in any church or public chapel erected and consecrated since the statute 26 Geo. 2. c. 33. (b); and enacts, that in future

[(a) See Reg. v. Bowen, 2 Car. & K. 227.]

(b) By the statutes 44 Geo. 3. c. 77, and 48 Geo. 3. c. 127, marriages which had been solemnized in churches and chapels not within the stat. 26 Geo. 2. c. 33, were confirmed. [By the 11 G. 4. & 1 W. 4. c. 18. sec. 5. marriages are declared valid which have been celebrated in chapels, the consecration of which might be doubted. By the 6 & 7 W. 4. c. 24, marriages are declared valid which had been celebrated in St.

Ann's chapel, in the parish of Wandsworth. Chap. 92 contains a similar provision as to marriages celebrated in the new church of St. Clement's, Oxford. By the 7 & 8 Vic. c. 56. marriages are declared valid which have been solemnized in certain district churches. By the 3 & 4 Vic. c. 72. provision is made for the solemnization of marriages under the 6 & 7 W. 4. c. 85. in the districts in or near which the parties reside.]

marriages may be solemnized in all churches and chapels erected and consecrated since that time, in which it had been customary and usual before the passing of the Act (July 5, 1825) to solemnize marriages.

In the case of *Pertreis v. Tondear* (a), it seems to have been considered as open to doubt, whether a marriage in the chapel of a foreign ambassador might not be considered as partially exempted from the operation of the former Marriage Act. The ceremony took place in the chapel of the Bavarian ambassador without banns or license: the husband was one of the suite of the Spanish ambassador: the woman had been four months in England, and did not appear to belong to the household of any ambassador. It was argued, that an ambassador's house and chapel were to be considered as part of the country to which he belonged, and that the Marriage Act would not therefore extend to persons residing there. On the other hand, the words of the Act were relied on; and a case of *Hienel v. Fierville*, 1783, was cited, where it was said that a marriage solemnized in the house of the Venetian ambassador was declared null. Lord Stowell said, it had perhaps never been formally decided that the supposed privilege in ambassadors' chapels existed; but if it did, he thought it difficult to bring this case within it, as neither of the parties belonged to the country of the ambassador; and the woman had been in England long enough to acquire a matrimonial domicile, and it did not appear that she had been living in a house intitled to this privilege.

In this case, as well as in that of *Ruding v. Smith* (b), Lord Stowell's opinions seemed to incline in favour of the privilege; but whatever rule might be deduced from a consideration of general international law, it would be difficult on any such grounds to establish an exception to the positive expressions of the Marriage Acts. On the other hand, it is to be observed, that if this privilege did not exist, it would lead to the conclusion, that persons solemnizing marriages in those chapels are liable to prosecution for felony. Under the present Act, the clause of nullity applies only where the parties knowingly and wilfully intermarry in a place not a church or chapel wherein banns may be lawfully published; and if, therefore, the parties acted *bonâ fide*, it would probably be held that the case did not come within that clause; and if so, the validity of the marriage would depend on the general law prevailing before the old Marriage Act:

(a) 1 Hagg. 136.

(b) 2 Hagg. 386.]

The second ground of nullity under the present Act, is knowingly and wilfully intermarrying without a due publication of banns, or license from a person having authority to grant the same.

Under the former Act, 26 Geo. 2. c. 33, it was held that the banns must be published in the true names of the parties; for though this was not expressed, it was implied in the direction, that the true christian and surnames were to be notified to the minister. (a) A publication of banns with false names was, therefore, held to be no publication at all; and as the eighth section made void marriages solemnized without banns or license, it was held that when the marriage took place upon a publication of banns in false names, it was absolutely void, without reference to the age of the parties or the object of assuming the name. (b) And if, instead of making use of an entirely false name, the real name was varied so as to disguise its identity nearly as much as a total change would do, the misnomer was for the same reason fatal, from whatever cause it might have arisen. (c)

A name acquired by reputation only, has been held to be the true name within the meaning of the statute. (d) And this is the rule which governs the case of illegitimate children, who have no surname, except what they acquire by repute, though usually designated by the name of the mother (e): the name by which they are usually known is that which should be used in the publication of banns. (f) In one case, Lord Stowell observed, that an illegitimate child might, at different times and places, pass under a variety of names, so as to arrive at a marriageable age without being possessed of any name clearly ascertainable as belonging to her. He thought that such a case would not be within the statute, as the party being without a true name, a literal compliance with the law would be impossible; and the marriage of such a person might be judged of upon the

(a) *King v. Billingshurst*, 3 M. & S. 250: *Pougett v. Tomkins*, *ibid.* 262; 2 Hagg. 142; 1 Phill. 499.

(b) *Frankland v. Nicholson*, 3 M. & S. 259: *Mather v. Ney*, *ib.* 265: and see 2 Hagg. 254: [and *Rex v. Inhab. of Tibshelf*, 1 B. & Ad. 190: *Allen v. Ward*, 1 Bing. N. C. 8; 4 Moo. & S. 165: *Farquharson v. Farquharson*, 3 Add. 282.]

(c) 2 Hagg. 254.

(d) *King v. Billingshurst*, 3 M. & S.

250: *King v. Burton upon Trent*, *ib.* 537: *Mayhew v. Mayhew*, *ib.* 266; 2 Phill. 11: *Wilson v. Brockley*, 1 Phill. 132: and see 3 M. & S. 260: [and *Rex v. Inhab. of St. Faith's, Newton*, 3 Dowl. & Ry. 349: *Diddear v. Faucit*, 3 Phill. 580.]

(e) *Wakefield v. Wakefield*, 1 Hagg. 394; 1 Phill. 134, n.: see 2 Hagg. 253.

(f) *Sullivan v. Sullivan*, 2 Hagg. 238; 3 Phill. 45: *Wilson v. Brockley*, 1 Phill. 132.

footing of the old canon law, under which such a defect in the banns would not impair its validity. The case before him approached, in its circumstances, very nearly to the case put; the name used in the banns was the name of the party's mother, by which she had been baptized, and which she had used upon various occasions: and though several other names had been assumed, Lord Stowell thought that this was not so clearly demonstrated to be an untrue name, if she did possess a true name, as to warrant him in declaring the marriage void. (a)

In cases where the publication of banns takes place in names partially altered from the true names, and where the variation is not so important that it must necessarily deceive, or where "the disguising effect of the variation does not appear on the very face of the name," different considerations were applied. Such variations may be in different degrees from different causes, and with different effects; and the Courts, though not inclined to encourage a dangerous laxity, would not disturb honest marriages by a pedantic strictness. If, without any design of fraud, there had been an accidental mistake of this description, the marriage was not vitiated by it. But if the erroneous publication was known to the parties, and intended by them to deceive a third person, as the father or guardian, the strict letter of the law was enforced; and the alteration of name, though not in itself sufficient to avoid the marriage, was held fatal when originating in such a fraudulent design. The Court, it was said, would hold against the party, that what he intended to be sufficient to disguise the name, should be so considered against him. (b) The question, therefore, in these cases was, whether the partial misnomer was casual or fraudulent. It was open to explanation; if none was offered, the Courts, in general, inferred that the variation was not *bonâ fide*: but

(a) *Wakefield v. Wakefield*, 1 Hagg. 394; 1 Phill. 134, n.: and see *Mayhew v. Mayhew*, 3 M. & S. 266.

(b) See 2 Hagg. 255. The principles applied by the ecclesiastical courts to these cases seem to have proceeded rather upon views of natural equity than upon a strict interpretation of the statute. The clause of nullity applies only to marriages without publication of banns. The only inquiry, therefore, is, whether that which has taken place is publication of banns, depending, therefore, only upon what has been

done, and not upon the intention with which it has been done. The rules, thus applied, have naturally led to the idea, that the intention of fraud may be stronger evidence of the insufficiency of the publication as against the guilty party, than it would be as against the innocent one; and that the decision may, therefore, vary according as the one or the other is plaintiff. See *Poynter on Marriage*, p. 33. Yet it is plain that, under the statute, this can make no difference.

if the explanation given, by tracing the error to causes perfectly innocent, protected it from the imputation of fraud, the publication was recognized as a due publication. If the explanation left it doubtful what was the intention, evidence of general fraud might be let in, for the purpose of illustrating the intention with which the inaccurate designation was resorted to. (a) But since the Court is precluded by the statutes (b) from receiving evidence of the non-residence of the parties in the parish in which the publication took place, it seems that that fact is not admitted to be pleaded, even with the view of proving a fraudulent intention. (c) It is to be observed, that in cases of this description, where a fraudulent design formed one of the ingredients, the question did not arise if there was no person whose rights could be affected by the fraud, as in the case of both parties being of age, and aware of the circumstances, and there being no impediment to the marriage. (d) But it seems that even if there were no person competent to object to the publication of banns, and if there could, therefore, be no design of eluding observation, still if a varied name was assumed by one party, with the view of imposing upon the other, the marriage might be successfully impeached by the injured party, on the ground of this fraudulent misnomer. (e)

In cases of a partial variation of name in the banns, an intention of fraud has, in general, been alleged; and it is not, therefore, easy to collect what degree of variation would be deemed so material as to invalidate the marriage, if unattended by circumstances of fraud. It has, however, been decided, that the addition of a final *s* (f), or the omission (g) or the interpolation (h) of a christian name, would not in itself be fatal. On the other hand, it appears to have been considered that alterations of the surname from *Meddowcroft* to *Widdowcroft* (i), and from *Longley* to *Long* (k), so far varied the substance of the name

(a) *Pougett v. Tomkins: Sullivan v. Sullivan*, *ub sup.*

(b) 26 Geo. 2. c. 33. s. 10: 4 Geo. 4. c. 76. s. 26.

(c) *Tree v. Quin*, 2 Phill. 14: see 2 Phill. 104; 2 Hagg. 147.

(d) See *Mayhew v. Mayhew*, 3 M. & S. 266; 2 Phill. 11. It is not mentioned in the latter report, that the woman had been generally known by the name used in the banns.

(e) *Heffer v. Heffer*, 3 M. & S. 265: *Fellowes v. Stewart*, 2 Phill. 238. 257.

(f) *Dobbyn v. Corneek*, 2 Phill. 102.

(g) *Pougett v. Tomkyns*, 3 M. & S. 262; 2 Hagg. 142; 1 Phill. 499.

(h) *Sullivan v. Sullivan*, 2 Hagg. 238; 3 Phill. 45: *Heffer v. Heffer*, 3 M. & S. 265; 2 Hagg. 255, n.: *Green v. Dalton*, 1 Addams, 289.

(i) *Meddowcroft v. Gregory*, 2 Hagg. 207; 2 Phill. 365, [affirmed in the Privy Council, *Meddowcroft v. Hugonin*, 8 Jur. 431: and see *Perry v. Meddowcroft*, 10 Beav. 122.]

(k) — *v. Longley*, 1 Phill. 148, n.

as to be alone sufficient to annul the marriage. In other cases, where sentences of nullity have been pronounced, from partial alterations of the name, attended with circumstances of fraud, it was not necessary to decide whether the misnomer alone would have been followed by the same result. (a)

These were the principles which governed the decisions in cases of nullity of marriage from publication of banns in false or varied names, while the statute 26 Geo. 3. c. 33, was in force. Under the statute 4 Geo. 4. c. 76, the clauses requiring the notification of the true names to the minister remain the same: and this statute must therefore, in the same way as the former, be held to intend that the true names shall be used in the publication of banns; but a defect in this particular will not be fatal, unless it appears that the parties knowingly and wilfully intermarried without a due publication. [(b)] The parties will, therefore, be relieved from the penalty of nullity, where a wrong name is used by mistake, or where the misnomer is occasioned by one party, without the knowledge of the other. [(c)] Thus, cases where a false name is assumed by one party, with a view of imposing on the other, will not come within this section.

It is to be observed, that the former statute rendered the marriage void, if had without publication of banns; the expression in the present is, "without *due* publication." A publication in false names or in names fraudulently varied, was brought within the former statute, as being held to be no publication at all. Perhaps a slighter variation, wilfully resorted to, may come within the present statute; as it may be contended, that a publication of banns may take place under circumstances making it an *undue* publication, though not amounting to so wide a departure from the proper form as to warrant the courts in holding it to be no publication. [It seems that a marriage without any publication of banns will be within this clause as a marriage without due publications of banns. (d)]

It is possible, also, that cases may arise under the present act, where other irregularities (distinct from any variation of the names) may be

(a) *Wyatt v. Henry*, 2 Hagg. 215: *Stanhope v. Baldwin*, 1 Addams, 93.

[(b) *Wiltshire v. Prince*, otherwise *Wiltshire*, 3 Hagg. Eccl. R. 333: *Tongue v. Allen*, 1 Curt. 38: *S. C. Tongue v. Tongue*, 1 Moo. P. C. C. 90: *Brealey v. Reed*, 2 Curt. 833. But the parties will not be allowed to evade punishment

for bigamy by contracting a concerted invalid marriage: *Rex v. Penson*, 5 Car. & P. 412.]

[(c) *Rex v. Inhab. of Wroxton*, 4 B. & Ad. 640; 1 Nev. & M. 712: *Wright v. Elwood*, 1 Curt. 48. 664.]

[(d) *Wright v. Elwood*, 1 Curt. 673.]

practised in the mode of publishing the banns, which may be considered to render it an undue publication. However, no objection can be made on the ground of non-residence in the parish in which the publication took place. (a)

It was in one case made a question, whether a marriage be invalid if the banns be published in one parish, and the solemnization takes place in another. (b) The two statutes are alike on this point, both directing that the marriage shall be solemnized where the banns have been published, and in no other place; but not in terms enforcing this direction by the clause of nullity. If the parties be resident in the parish where the publication takes place, it is a due publication; and though the marriage be solemnized in the wrong parish, it is not within the clause of nullity, if it takes place in a church or chapel properly qualified. But if the parties be not resident in the parish where the publication takes place, the question would be, whether the irregularity would be protected by the 26th. section. That section applies to cases where there has been a solemnization under a publication of banns, and it may be doubted whether it would apply to a case where the banns as published did not authorize the solemnization.

The nullity arising from the want of a license, by the present act, is confined to cases where the parties knowingly and wilfully intermarry without a license from a person or persons having authority to grant the same. Under the former act, which did not contain the words knowingly and wilfully, it was doubted whether want of authority in the person granting the license would annul the marriage, if no fraud was contemplated by the parties. (c) Under the present act, this question cannot arise; and if a case should happen of a license being purposely procured from a person not duly authorized, the clause would apply. [But the want of authority must be known to both parties. (d)] It would also apply to a marriage by a forged license. A misdescription of the persons, a variation in the name, where there is no doubt about the identity (e), or the use of an assumed name by which the party is commonly known (f), will not vitiate the license.

(a) 4 Geo. 4. cap. 76, sec. 26. [See *Connell v. Masson*, 10 Law J. 140. However, the clergyman is liable to be proceeded against in the Ecclesiastical Court for such an irregularity: *Wynn v. Davies*, 1 Curt. 69.]

(b) *Stallwood v. Tredger*, 2 Phill. 287.

(c) *Balfour v. Carpenter*, 1 Phill. 204.

[(d) *Dormer v. Williams*, 1 Curt. 870.]

(e) *Ewing v. Wheatley*, 2 Hagg. 175.

(f) *Cope v. Burt*, 1 Phill. 224: *King v. Burton upon Trent*, 3 M. & S. 537.

[See also *Clowes v. Clowes*, 3 Curt. 185;

S. C. Clowes v. Jones, 7 Jur. 908:

But there may be a degree of fraud in the description which would have that effect (*a*), and which, it seems, would be fatal to the validity of the marriage; for unless the description in the license can be shown to apply to the parties who were married, the case must be considered as that of a marriage between two persons under a license granted to two others, and this would be the same as a marriage without license, there being no license for that marriage.

In one case, an alteration was made in the license by the parties before the marriage, correcting the spelling of the name, by changing it from Ewen to Ewing: this was held not to affect the marriage. (*b*)

The other cause of nullity, under the present act, is knowingly and wilfully consenting to or acquiescing in a solemnization of the marriage by a person not in holy orders. The act does not apply to cases where the marriage is solemnized by a layman, pretending and supposed by the parties to be a clergyman: the validity of the marriage, under such circumstances, will depend upon the law prevailing before the Marriage Act.

The objection to the validity of marriages duly solemnized according to the laws of a foreign state, to which the parties have resorted in order to avoid the legal restraints existing in their own country, though apparently sanctioned by Lord Mansfield (*c*), has not prevailed either with respect to marriages in Scotland, or with respect to marriages in other places out of England (*d*); and there does not appear to be any exception to the rule, "that a foreign marriage, valid according to the law of the place where celebrated, is good every where else." (*e*)

And the converse of this rule will in general hold. Thus, in *Scrimshire v. Scrimshire* (*f*), *Middleton v. Janverin* (*g*), and *Lacon v. Higgins* (*h*), [and *Kent v. Burgess* (*i*),] marriages of English subjects abroad, celebrated according to the foreign ceremonial, but which, from being irregular or clandestine, were void under the foreign law,

Lane v. Goodwin, 4 Q. B. 361; 3 Gale & D. 610; 12 Law J. N. S. Q. B. 157; 7 Jur. 372.] See p. 428, and see 2 Hagg. 414: Ambli. 404: Harg. Co. Litt. 79, *b*, note 1.

(*a*) *Ewing v. Wheatley*, 2 Hagg. 175.

(*b*) *Ibid.*

(*c*) *Robinson v. Bland*, 2 Burr. 1077; 1 W. Black. 234.

[(*d*) *Harford v. Morris*, 2 Hagg. 423.]

(*e*) 2 Hagg. 390: [and see *Swift v. Kelly*, 3 Knapp. P. C. C. 237.]

(*f*) 2 Hagg. 395.

(*g*) *Ibid.* 437.

(*h*) 3 Starkie, 178.

[(*i*) 11 Sim. 361; 5 Jur. 166.]

were also held to be void in this country. But the principle, that a question of the nullity of a foreign marriage between British subjects is to be governed by the *lex loci*, is subject to some exceptions.

Marriages in British factories, and in chapels of British ambassadors abroad, have by a late statute (a) been declared valid, and before that time they were sometimes considered as forming an exception to the general rule. In *Ruding v. Smith* (b), Lord Stowell stated, that marriages in English factories abroad are regulated by the law of the original country, to which they are still considered to belong. Practice had in several instances established the principle, that the general law of a country should circumscribe its own authority in this matter, and where the practice was admitted, it was intitled to acceptance and respect. It had sanctioned the marriages of foreign subjects in the houses of the ambassadors of the foreign countries to which they belonged. His Lordship was not aware of any judicial recognition upon the point, but the reputation which the validity of such marriages had acquired, made such a recognition by no means improbable, if such a question were brought to judgment. (c) He thought, that if such a practice had been sanctioned by long acquiescence and acceptance of the one country, which had silently permitted such marriages, and of the other which had silently accepted them, the Courts of this country would not incline to shake their validity upon large and general theories, encountered as they were by numerous exceptions in the practice of nations.

It will be observed, that these remarks in favour of the validity of such marriages rest in a great measure on the supposition of their being sanctioned by the law or the practice of the country where they may be celebrated, and therefore leave it doubtful whether they could have been supported (before the late statute) if clearly void according to the *lex loci*. In one case, Lord Ellenborough said that marriages in ambassadors' chapels, if made by the allowance of the foreign state, would be good marriages in those countries; but that, if not a good marriage in the place where it was celebrated, it could not be a good marriage any where. (d) However, the Lord Chancellor is reported to have given his opinion in the House of Lords, that there was no doubt about the validity of such marriages.

Another distinction was made (before the late statute), with respect to the marriages of British subjects celebrated in a country in the

(a) See *post*.

(b) 2 Hagg. 371.

(c) *Ibid*. 386.

(d) 10 East, 286.

military occupation of British troops, which were considered to be subject to the English law, in the same manner as marriages in British colonies and settlements. Thus, where an officer of the army of occupation in France was married to an English lady by the chaplain to the forces, Lord Stowell intimated an opinion, that the marriage, though void according to the French law, would be supported here, on the ground that under the circumstances the parties were not French subjects under the dominion of French law. (a) And it was partly for the same reason, that in *Ruding v. Smith*, a marriage between two British subjects at the Cape of Good Hope, at the time when that place was occupied by English troops under a capitulation, was held to be valid, though void under the Dutch laws, which were in force there. (b) The same principle was applied by Lord Ellenborough to the case of a marriage between a soldier serving with the English army in St. Domingo, and an English woman. (c)

The late statute 4 Geo. 4. chap. 91, recites, that it is expedient to relieve the minds of all his Majesty's subjects from any doubt concerning the validity of marriages solemnized by a minister of the church of England in the chapel or house of any British ambassador or minister residing abroad within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory, as well as from any possibility of doubt concerning the validity of marriages solemnized within the British lines, by any chaplain or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad; and it then enacts and declares, that all such marriages as aforesaid shall be deemed and held to be valid in law, as if the same had been solemnized within his Majesty's dominions, with a due observance of all forms required by law.

It was considered previously to this statute, that the supposed privilege of ambassadors' chapels would only extend to cases where both the parties were subjects of the country of the ambassador (d); but the expressions of the enacting part of the statute apply, whether the parties are or are not British subjects. [(e)] With respect to marriages within the lines of a British army abroad, it supplies defects arising from the non-observance of any forms, or

(a) *Burn v. Farrar*, 2 Hagg. 369.

(b) *Ibid.* 387.

(c) *King v. Brampton*, 10 East, 282.

(d) See *Pertreis v. Tondear*, 1 Hagg. 136.

[(e) *Lloyd v. Petitjean*, 2 Curt. 251.]

from the want of a clergyman: but marriages in factories or ambassadors' chapels, not performed by clergyman of the church of England, are left in the same situation as before. (a)

It was intimated by Lord Stowell, in *Ruding v. Smith*, that where a compliance with the regulations established in a foreign country was impossible, the necessity of the case might exempt it from the operation of the *lex loci*. If from legal or religious difficulties the ceremony could not take place according to the law of the country, the law of England did not (as he conceived it) say that its subjects should not marry abroad. (b) The case before him he thought as nearly intitled to the privileges of strict necessity as could be: the husband had attained the age of twenty-one years, but being under thirty the consent of his father was required by the Dutch laws prevailing at the Cape: the wife was a minor without any legal guardian: and one of the grounds of decision was stated to be the insuperable difficulty of obtaining any marriage according to the Dutch Law. (c)

If the law of the foreign country imposed any highly unreasonable restraints upon marriage, it might perhaps be held in England, that the marriage of British subjects in a manner conformable to the general law of England was valid. Thus, in *Ruding v. Smith*, Lord Stowell puts the case of a foreign law, fixing the period of majority at an advanced period of life, as forty; and suggests that it would be a question, whether the marriage of two British subjects, not absolutely domiciled abroad, should be invalidated on that ground.

(a) By another statute passed in the same session (4 Geo. 4. chap. 67), reciting, that the British factory at St. Petersburg was, by a manifesto of the Emperor of Russia, declared to be abolished from the 20th of June, 1807, it is enacted that all marriages (both or one of the parties thereto being subjects or a subject of this realm) that have since the 20th of June, 1807, been solemnized, or that shall hereafter be solemnized at St. Petersburg, by the chaplain to the Russia Company, or by a minister of the Church of England, officiating instead of such chaplain in the said chapel of the said Russia Company, or in any other place before witnesses, shall be as good and valid in law, and so deemed in the United Kingdom of Great Britain and Ireland, and the dominions there-

unto belonging, as if the same had been solemnized before the abolition of the said factory. [By the 3 & 4 W. 4. c. 45. marriages were declared valid which had been solemnized at Hamburgh since the abolition of the British factory there.]

(b) 2 Hagg. 391.

(c) The statute 57 Geo. 3. chap. 31, cited *ante*, [p. 383.] declaring void marriages in Newfoundland not solemnized by clergymen, excepts marriages that may be had under circumstances of peculiar and extreme difficulty in procuring a person in holy orders to perform the celebration, and in which the law might on that account otherwise determine on the validity of such marriages.

Another distinction has in some cases been taken, with respect to the marriages of British subjects in foreign countries, in which their residence has been only temporary, without an *animus morandi*. Though it is clear that such marriages, if conformable to the foreign law, are good, yet it seems questionable how far the converse of this proposition is true. In *Harford v. Morris* (a), it was stated to be clear, that a transient residence, by coming one morning and going away the next, was not such a residence as to make the *lex loci* applicable, and the marriage there was confirmed, though void according to the law of the country where it was celebrated. (b) This opinion is of less weight from the sentence having been reversed (though the reversal was upon other grounds), and it is certainly contrary to the doctrine of the cases of *Scrimshire v. Scrimshire*, and *Middleton v. Janverin*, as well as to the doctrine attributed to Lord Hardwicke, in *Butler v. Freeman* (c): it is, however, favoured by several of the remarks which fell from Lord Stowell, in the above-mentioned case of *Ruding v. Smith*. In that case his Lordship was of opinion, that the character of the husband, the circumstance of his not being a settler, but a military servant of the British government, coming into the country, not to purchase, to sue, or to live there, but in the prosecution of a further voyage directed by British authority, ought to operate in favour of exempting him from the restrictions of the *lex loci*. (d)

But, if for these reasons the marriages of British subjects temporarily resident in foreign countries be privileged, the privilege will, it seems, be forfeited by the parties voluntarily resorting to the *lex loci*, and will not support a marriage which is solemnized according to the foreign ceremonial, but which, as being clandestine, is void under the foreign law. On this ground Lord Stowell reconciled the opinions which he expressed in *Ruding v. Smith*, with the decisions in *Scrimshire v. Scrimshire*, and *Middleton v. Janverin*. (e) When the parties have recourse to the form of solemnization established in the country in which they are, their mutual intention must, it has been said, be presumed to be, that it should be a marriage or not, according to the laws of that country. (f)

It is to be observed, that in all the instances in which the

(a) 2 Hagg. 423.

(b) Ibid. 431.

(c) Amb. 303.

(d) 2 Hagg. 389.

(e) See 2 Hagg. 393.

(f) 2 Hagg. 411, 412: and see 2 Phill. 285.

marriages of British subjects, celebrated abroad, in a manner not conformable to the *lex loci*, are considered valid by the English courts, either upon general principles, or by virtue of legislative enactments, it is a different question whether they are also valid in the country in which they took place, and in other foreign countries: the decision of that question must of course depend in each case upon the law of the particular place in which it may happen to be raised. And hence it is, as Lord Stowell observes, always the safest course to solemnize the marriage according to the law of the country. (a)

British subjects residing in British settlements abroad, are governed by the laws of England, excepting where alterations have been introduced by express enactment. Hence, their marriages are regulated by the English law, which, with respect to marriages beyond the seas, is the same as before the statute 26 Geo. 2. chap. 33. Thus, a marriage between two British subjects, celebrated at Madras by a Roman Catholic priest in a private room, was held to be valid. (b)

The statute 58 Geo. 3. chap. 84, confirming marriages celebrated in the British territories in the East Indies, by ministers of the church of Scotland, has been already noticed. The retrospective branch of this statute confirms all marriages which had been thus celebrated, without reference to the religion of the parties. It renders valid future marriages thus celebrated, both or one of the parties being members, or a member of, or holding communion with the church of Scotland, and previously making a declaration in writing to that effect.

(a) 2 Hagg. 391.

(b) *Lantour v. Teasdale*, 7 Taunt. 830; 2 Marsh. 243.

No. II.

Of the Husband's Power over the Wife's future Interests in Choses in Action. By Mr. Jacob. (a)

THE extent of the husband's power over the wife's interests in choses in action is a subject on which there has been considerable difference of opinion. The decision in the case of *Hornsby v. Lee* (b), that an assignment of the wife's reversionary interest in a trust fund, made by the husband for valuable consideration, did not bar the wife's right by survivorship, has sometimes been questioned; and it has been supposed that the previous authorities had established the proposition that the husband might by assignment for valuable consideration bar his wife's right by survivorship to her reversionary choses in action, provided they were such as might possibly have fallen into possession during the coverture. This opinion is supported by the author, who has collected the cases and dicta which appear to sanction it (c): his argument has been ably answered by Mr. T. Canning. (d) In a recent case, not yet reported (*Purdew v. Jackson*), the point again occurred, before the same learned judge who decided the case of *Hornsby v. Lee*: it is understood to have been fully discussed and considered, and the decision was the same as in the former case. It must be admitted that these decisions are contrary to an opinion which had previously been entertained by many members of the legal profession, but a consideration of the subject will show that this opinion is one not easily to be reconciled with principle, and that it has originated in some dicta, to which too extensive a meaning seems to have been ascribed.

A chose in action not being assignable at law, an assignment of it can only be made effectual upon the principles of equity; and it is supported in equity, on the ground that it is an agreement, by which the assignor is bound to give to the assignee the benefit of that which he has assigned. "It is by agreement, in most cases of choses in action, that the assignee takes it. His covenant is, in this Court, a disposition of it that could be enforced against him; and as against

(a) *Vide supra*, vol. I. pp. 73. 75. This discussion formed No. 3. of the Addenda to Mr. Jacob's edition of Roper.

(b) 2 Madd, 16.

(c) Mr. Roper's argument will be

found in No. 4. of the Appendix to this work.

(d) Observations on a Case lately submitted to Counsel, &c. By Thomas Canning, Esq., 1820.

him, at least, would go to the representative of the person agreeing with him." (a) Upon principle, therefore, the right of the assignee of a chose in action is derived from his right to call upon the assignor for a specific performance of the agreement between them; giving him no original right, except as against the assignor and his representatives. He is intitled to whatever interest the assignor himself possesses, or is able to procure. If the husband sells the chose in action of his wife, he is bound by his contract to do whatever is in his power for reducing it into the possession of the purchaser; and the right of the purchaser is therefore co-extensive with the husband's legal power of acquiring the property.

In some of the earlier cases this principle was more rigorously enforced than at present; it was considered, that even if the husband had the power of reduction into possession, unless he actually exercised that power, his wife's right by survivorship could not be interceded by his agreement. If the husband assigned for valuable consideration a chose in action belonging to his wife, which might have been immediately recovered, it was held that the wife's right by survivorship subsisted, unless the property was actually recovered during the coverture. (b) The assignment not being effectual at law, it was thought that there was no equity to make it good as against the wife surviving and claiming by title paramount.

But this doctrine seems to have given way to other principles, founded on the general rule, that where there has been an agreement for valuable consideration, the question shall be treated in the same manner as if the agreement had been performed. This rule, obviously just in cases arising between the parties to the agreement, and those claiming under them, has been extended to some other cases, where its justice is less apparent; for some purposes an agreement to do an act, which the party agreeing has it in his power to do, is considered as if actually performed, as against third persons claiming by a distinct title, which might have been defeated by an actual performance. This equity, which perhaps originated in a notion that the omission to do the necessary acts for carrying the agreement into effect, was a species of accident from which relief should be given, is exemplified by the cases where agreements for the execution of powers by tenants for life are held binding upon the remaindermen; and it seems to have been upon similar principles that assignments of the wife's choses in action immediately recoverable, when for valuable

(a) 6 Ves. 394. (b) Prec. in Ch. 121. 419; Gilb. Eq. R. 103; 2 Freec. 241.

consideration, have been held binding on her surviving. The husband has agreed that the purchaser shall have that which has been assigned; this agreement might and ought to have been performed whilst he was living, and is therefore treated as if it had been accordingly performed. (a)

But this principle, whether it was or was not originally well-founded (b), can have no application to an assignment of a reversionary interest; the husband having no legal power to reduce it into possession, if he dies before it falls in. His agreement to place it in the possession of the assignee, is one that he could not have effectuated; and an agreement which could not by possibility have been performed, cannot upon any principle of equity be treated as if it had been performed. The assignment gives to the assignee such interest as the husband had, and a right to call upon him to render that assignment effectual; but it cannot upon principle give a right to call upon the wife, who is a stranger to the contract, to do that which it was never in the husband's power to do.

The principle that a man cannot by contract give to another an interest which he does not possess, and which he has no means of acquiring, is so obviously just, that it would require strong authority to establish an exception to it.

The case of *Atkins v. Dawbury* (c) is the only instance adduced as a direct decision, that an assignment of a reversionary interest is binding on the wife surviving. It seems, however, not to have been considered as the case of a reversionary interest. The Court said, that though the "legacy was charged on a reversion, which was not an immediate fund for the raising it, yet being given to the wife *in præ-senti*, when the wife comes in, it shall carry interest from the testator's death." The Court gave as one reason for the decision, that the husband had by his will confirmed the assignment, and given the legacy again in the same manner. The wife was his executrix, and if she took any benefit under his will, was of course bound to affirm this bequest. But so far as the decision turned on the effect of the assignment alone, it is clear that it could not now be supported, the assignment having been made without valuable consideration.

The dictum of Lord King, in *Chandos v. Talbot* (d), was uttered

(a) 2 Ves. Sen. 20.

(c) Gilb. Eq. Rep. 88.

(b) See Sugden on Powers, 3d ed., p. 346, [2 Sug. Pow. 91. 7th ed.] and the observations of Sir W. Grant, there referred to.

[(d) Cited *antè*, vol. I. of this treatise, p. 100.]

in a case in which the legacy assigned became payable during the coverture, and he put the assignment on the footing of an agreement for valuable consideration.

The dicta attributed to Lord Hardwicke, in *Grey v. Kentish* (a), and *Hawkyns v. Obyn* (b), favour the opinion that the husband's assignment would be effectual against the wife surviving; but it is to be remarked, that in both cases the decree was in favour of the wife. In the first of these cases the wife's right to a provision, and her right by survivorship, are confounded in the report, so that it does not appear upon which ground the decree proceeded. In the latter case, the property consisted of the interest of a fund given to the husband and wife for their lives and the life of the survivor; and it was therefore open to considerations different from those applicable to a reversionary interest given to the wife alone.

In *Bates v. Dandy* (c), Lord Hardwicke is reported to have said: "The husband may assign the wife's chose in action, or a possibility that the wife is intitled to, as well as her term, so that it be not voluntary, but for a valuable consideration; but though he cannot dispose of her chose in action without a valuable consideration, yet he may release the wife's bond without receiving any part of the money."

Upon this passage the first observation which arises is, that the accuracy of the report cannot be very confidently relied on. The first branch of the sentence implies that the husband cannot assign the wife's term, except for valuable consideration; the second speaks of a bond as if it were different from a chose in action.

These mistakes make its authority at least questionable, and as the case itself involved no point relative to a future interest, the expression about the assignment of a possibility can, at most, have only that degree of weight which belongs to extrajudicial dicta.

But if any inferences can be drawn from these remarks, they stand opposed to other cases before the same judge, in which the point is more explicitly adverted to.

In *Bush v. Dalway* (d) (which was subsequent to these three cases), the question related to a portion secured to the wife, payable on her surviving her father. Lord Hardwicke says, "A question was made, whether the husband had a right to assign it in the father's life; which is not necessary here, although I think he might not. In *Theobald*

[(a) Cited *antè*, vol. I. of this treatise, pp. 81. 82.]

(b) 2 Atk. 551.

(c) 2 Atk. 208.

(d) 1 Ves. Sen. 19; 3 Atk. 530.

v. Duffoy, before Lord Macclesfield, an assignment by husband and wife of the wife's executory interest was held good. There the wife had something more than in this case; but that turned on her joining, on which foundation the Court determined it for the purchaser, which was affirmed by the Lords. Here, before the father's death, he had no right of action at all, but afterwards he might have called for it immediately." (a) This is a clear expression of opinion, directly applying to the point under discussion.

The question in the cause was, whether the wife's right to this portion was bound by her marriage settlement, by which the husband had covenanted that it should be settled upon certain trusts: and it was held to be bound, on the ground that the father having died during the coverture, the husband became immediately intitled. "Perhaps," said Lord Hardwicke, "the event might have happened, that she would not have been bound, as if the right of action never had vested in the husband; but here it did, by his surviving the father." The question, he added, depended on the general rule, that what ought to be done was considered in equity as done, and this ought to have been done, (*i. e.*) the covenant ought to have been performed in the life of the husband. (b)

So in *Medcalfe v. Ives* (c), where a man, by a settlement previous to his marriage with the infant daughter of a freeman of London, in consideration of a portion, covenanted with the father to release her customary part, Lord Hardwicke said: "As to the objection of the customary part being a possibility, and merely a contingency, it is of no weight, for there is no doubt but it might be released in equity; but here is a covenant, which the defendant is bound by in all events, and it is no objection to say the wife was under age; for

(a) 1 Ves. Sen. 20. The report in *Atkins* contains similar expressions, with this addition, "but it has been frequently determined that a husband may assign a wife's chose in action for a valuable consideration; but what does that turn upon? Why, upon the husband's right to sell." There is probably some inaccuracy in the latter part of this passage; Lord Hardwicke would have given some better reason. According to both reports, he appears to have been distinguishing between present and future interests.

(b) It is stated in *Hornsby v. Lee*,

that the reversion fell in a short time before the death of the husband. The interest had, therefore, ceased to be reversionary; and it might have been contended, upon the principle laid down by Lord Hardwicke, that the fund having come into the power of the husband, ought in his lifetime to have been received and paid to the person to whom he had assigned it; and that it should, therefore, be bound by the assignment. But this point does not appear to have been noticed.

(c) 1 Atk. 63.

though, in this respect if the husband were dead, the articles would not bind her, and she would by survivorship be intitled to the customary share as a chose in action not recovered or received by the husband; yet he being alive, it is a matter that accrues to him in right of his wife, and he may release it, and his release will bind her, and therefore it was reasonable he should perform his covenant."

In these two cases the covenants were entered into before the marriage, but it is obvious that such a covenant is equally binding on the husband whether made before or after; and so far as its effect depends upon its being the agreement of the husband, it must be equally binding.

The grounds of the decision in the case of *Theobald v. Duffoy* (a), alluded to above, in which an assignment by the husband and wife of a possibility of a term, not assignable at law, was supported in equity as an agreement for valuable consideration, also furnish an illustration of the law on this subject. The judgment did not rest upon the circumstance of its being the husband's act: there is no intimation of the husband being competent, alone, to bind future interests of his wife not assignable at law: it turned on the fact of the wife having joined with the assent of her friends, proceeding on the notion, adopted in many early cases, that agreements entered into by married women or infants, if fair and reasonable, might be enforced in equity.

In another case (b), it was laid down by the Lord Chancellor, that the husband had no power whatever to release a future right of his wife's; that she might survive him, and would then be intitled to it in her own right. The facts were, that the wife's father, being a free-man of London, the husband, after the marriage, in consideration of 100*l.*, released the wife's customary part: he survived the father, and the release was ultimately held to be a bar. The husband being alive at the time when the interest in question fell in, the decision was consistent with the opinion expressed at first; it seems also to have turned partly on the fact of the wife having agreed to, or joined in the release. (c)

The cases of *Hewitt v. Crowcher*, and *Gregg v. Crowcher* (d), in which the consent of the wife was taken to a sale of her reversionary interest in a trust fund, seem to belong to that class of cases in which the Court of Chancery sometimes allowed the wife's consent to be

(a) 9 Mod. 101.

(b) *Kemp v. Kelsey*, Prec. in Chan. 544. 594; 2 Eq. Ca. Ab. 267.

(c) Prec. in Chan. 496.

[(d) Cited *antè*, vol. I. of this treatise, p. 92.]

given, considering its effect to be analogous to that of a fine at law. This practice was considered in *Sperling v. Rochford* (a), *Richards v. Chambers* (b), and *Pickard v. Roberts* (c), and proceeded upon the supposition that the property was not in the power of the husband, and that it could not be affected, except by a decree founded on the wife's consent: it was considered that the wife's right, in the event of her surviving, was barred by force of the consent and the decree, and not by the husband's assignment. Such cases, therefore, tend to show the limited extent of the power which the husband was supposed to have.

It is most probable that the wife's consent was received by Lord Alvanley, in *Gregg v. Crowcher*, and *Hewitt v. Crowcher*, for this purpose, and not for the sole purpose of waiving her equitable right to a provision. In his Lordship's opinion, "no interest of hers will be bound but by her consent, not taken by the negotiation of friends, but by the Court itself." (d) In *Woollands v. Crowcher* (e), where these cases were produced in argument, they were understood in this light; it was said, that the consent was to be taken by analogy to a fine, and that without it the wife would not be bound. The Master of the Rolls (Sir William Grant) also considered the question to be, whether the wife's right by survivorship should be barred by allowing her consent to be taken. "But in this instance," he says, "the object is not to bar her equity to have a settlement, but to bar her right to survivorship, for upon his death it belongs to her entirely. She is giving up not her equity only, but her entire right by survivorship. That is not the case in which the Court takes her consent. If the husband has a right to convey, let him exercise his right. But why this Court should join and aid him for this purpose, I do not know." On a subsequent day his Honour said that he should take the consent *de bene esse*: the principle upon which this was done does not distinctly appear from the short note of the judgment; but it may be collected that his Honour's intention was to receive the consent without prejudice, leaving open the question whether the wife would be bound by it if she survived: he observed that the effect of an assignment of reversionary property had been doubted, and referred to *Saddington v. Kinsman*. (f)

(a) 8 Ves. 164.

(b) 10 Ves. 580.

(c) 3 Madd. 384.

(d) 4 Ves. 18.

(e) 12 Ves. 417.

(f) 1 Bro. C. C. 44.

In the case of *Howard v. Damiani* (a), which occurred subsequently before the same learned Judge, and which was heard by consent, the decree was probably made with the same view as that in *Woollands v. Crowcher*: it did not in terms absolutely confirm the sale, directing only that the trustees should be at liberty to make the transfer.

In another case before Sir W. Grant, it was said by Sir S. Romilly, in argument (probably referring to *Richards v. Chambers*), that his Honour had decided that the husband could not assign his wife's reversionary interest: he interposed, saying, "That is if it could not fall into possession during his life, as a reversion upon his own death; not if it depended upon an event that might happen during his life." (b) This may be thought to imply, that in the latter case he might assign it; but the remark was obviously made only to correct an erroneous reference to *Richards v. Chambers*, that case applying only to reversions expectant upon the husband's death, and not affecting the question as to other future interests. His Honour's observation, in another case, that the husband can dispose of his wife's property in expectancy against every one but her surviving (c), is certainly an authority against the opinion that he has an unqualified power of assignment.

It may be observed, also, that at the time when Lord Hardwicke is supposed to have intimated an opinion in favour of the husband's power of assigning, the effect of his assignment for valuable consideration was in other respects not settled as at present. It was then doubtful whether it barred the wife's equitable right to a provision; the reasoning which has led to the doctrine now established, that such an assignment does not defeat the wife's equity, applies equally to the present question. "It would be whimsical then," says Lord Alvanley, "that the assignment by the husband for valuable consideration should put that assignee in equity in a better situation than the husband himself is in at law." (d)

One argument in favour of the husband's power to bind the future interests of his wife by assignment for a valuable consideration, is founded on the power which he is supposed to possess of binding such interests by his release. But if the supposition were clearly right, it would be difficult to maintain any very close analogy between a power of assigning for a consideration, and a power of releasing without any; and still more difficult to show that the right to assign must

(a) 2 Jac. & Walk. 458.

(b) 16 Ves. 122.

(c) 4 Ves. 19.

(d) 1 Ves. & B. 405.

be co-extensive with the power to release. Many cases may be put in which a release will operate at law upon that which the party could not assign, as in the case of the release of a bond previously assigned, a release by one or two partners, or by the husband of a feme executrix. If the rules of law enable a party, by his release, to pass a greater interest than he possesses, it does not follow that equity must give a similar extension to his power of contracting, or interfere to effectuate his attempt at alienation, invalid at law, and purporting to affect what does not belong to him.

It may, however, be doubted, whether the husband has even at law a general power of releasing the future rights of his wife.

In *Thomson v. Butler* (*a*), an annuity had been granted to the wife for her life: the husband by deed, in express terms reciting the annuity, released it. The wife having survived him, brought a writ of annuity: the release was pleaded, but was held to be no bar, because the husband's release could not extinguish the annuity of the wife, but if she survived she should have an action for it. This was a case of personal property, the writ of annuity being a personal remedy only. (*b*)

To this decision, the opinion of Lord Holt, in *Cage v. Acton* (*c*), is opposed; a case, however, in which his opinion does not possess the high authority usually attached to his name, his judgment upon the principal point in question having been more than once overruled, and the reasoning by which he supported it having been characterised by Lord Kenyon as merely flimsy and technical. (*d*) His opinion was, that any right or duty, which by possibility may accrue due during the coverture, may be released by the husband. He admitted, however, that a right or duty which could not accrue during the coverture could not be released by the husband, according to the cases of *Clark v. Thomson* (*e*), *Smith v. Stafford* (*f*), and *Lupart v. Hoblyn* (*g*), from which it appeared, that a covenant or promise made by a third person before the marriage to pay a sum of money to the wife, in the event of her surviving the husband, could not be released by the latter. And the proposition, that a legal right which cannot accrue

(*a*) Moore, 522. The case is reported on another point in Cro. Eliz. 721.

(*b*) See Co. Litt. 144, *b*.

(*c*) 1 Salk. 325; 1 Lord Raym. 515; 12 Mod. 288; Comyn, 67; Carth. 511; Holt, 309; 1 Freem. 512. 515.

(*d*) 5 T. R. 384.

(*e*) Cro. Jac. 571.

(*f*) Hob. 216; Hetl. 12.

(*g*) 1 Sid. 58.

during the coverture is not releaseable by the husband, seems to be well settled: it is difficult, however, to find any principle for this admitted limitation of the husband's power of releasing, unless it be that in this case the interest and the right of action cannot vest in him. And if this be the principle, it seems to follow, that the effect of his release depends upon his having an interest or right of action; and, therefore, that it will not operate beyond the extent of his interest, if no right of action ever vests in him.

In the case of a future covenant, *a. g.* a covenant to pay money at a future period, a release does not operate as a release of the right of action, none having arisen; and a release of all actions not discharging a covenant which has not been broken. (a) The reason why it may be released by express words, is said to be, that it is a covenant *in esse* (b), though the performance be future, and that the release discharges the present obligation and force of it. (c) But if the husband's release operated in this manner, its effect would apply equally to every future covenant made to his wife. Whether the covenant be for payment of money on the death of the husband, or on the death of a third person, it is equally a covenant *in esse*, and its present obligation and force is the same. And it would therefore follow (as it was contended in *Smith v. Stafford* (d)) that the husband might release a covenant, or promise, which could not take effect in his lifetime: but it has been held that he has not that power.

In the case in *Rolle* (e), it was said that the husband might release a legacy payable to his wife at a future day, because he had an interest in it before the day of payment, which interest it was clear he might have released. According to this case, his power of releasing results from his interest: and this is consistent with the case of *Thomson v. Butler*, and with the opinion that his release does not operate on that which cannot take effect in his lifetime. If then the effect of his release results from his interest, its effect ought on principle to be co-extensive with that interest. When the nature of the future right is such that he has no interest, his release is inoperative; and when, as in the case of a future covenant or promise, he has only a limited interest, it would follow that his release ought to operate only so far as his interest extends.

These observations refer only to cases where there is no immediate

(a) Co. Litt. 292, b.

(b) 10 Co. 51, b.

(c) Hob. 216.

(d) Ibid.

[(e) Cited *antè*, vol. I. p. 73. of this treatise.]

right of action. Different considerations might apply, if the future debt were secured, so that the husband might have an immediate right of action, as if a judgment had been given, or a bond of which part of the condition had been broken. The case might also be different, if the debt were actually paid to the husband before the time of its becoming due. In that case, the defence to an action brought by the wife surviving would be different, the question depending not on the release, but on the payment pleaded as a performance of the covenant or promise.

But whatever may be the rule of law with respect to the husband's release of a legal demand, it does not by any means follow, that the same rule must prevail with reference to equitable rights. The effects of releases of legal demands depend on many technical rules as to joinder in action, and the forms of pleading, which are not adopted in equity. The effect of a release in equity is more analogous to that of an agreement or a grant, than to that of a release at law. The plea of a release must in general show, that it was founded on consideration (*a*), and the effect of the plea is in some other respects different from that at law. (*b*) And a voluntary release of contingent and executory interests in equity has been held inoperative, even as against the party releasing. (*c*) In one case the Lord Chancellor says, that at law a possibility may be released, but distinguishes the case before him, because it was "a demand in equity under a trust." (*d*)

In *Salkeld v. Vernon* (*e*), the husband released his wife's orphanage share of her father's estate, receiving legacies under his will: yet it was considered doubtful whether this release of a present interest, and for consideration, could be binding upon the wife surviving. With respect to future interests in choses in action of an equitable nature, it was expressly laid down in *Kemp v. Kelsey* (*f*), that the husband could not release them; the same may be inferred from *Bush v. Dalway*, and *Medcalfe v. Ives*. The dictum of Lord Hardwicke in *Bates v. Dandy*, cited before, appears to allude to the distinction between releases of legal and equitable demands: "though he, the husband, cannot dispose of her chose in action without a valuable consideration, yet he may release the wife's bond without receiving any part of the money." (*g*) This seems to confine the husband's power

(*a*) See 2 Sch. & Lef. 728: Gilb. For. Rom. 57: Mitford on Pleadings, 212.

(*b*) See 2 Bligh, 617.

(*c*) *Robinson v. Bavasor*, 3 Vin. Ab. 155; *Morris v. Burroughs*, 1 Atk. 399.

(*d*) 3 Vin. Ab. 155.

(*e*) 1 Eden, 64.

[*(f)* Stated *antè*, p. 75. of this treatise.]

(*g*) 2 Atk. 208.

of releasing to legal demands, such as those on bonds, making a distinction between them and others which he cannot affect, except for consideration.

There seems, therefore, no reason for supposing, that the husband can release the future equitable interests of the wife, so as to bind her surviving. The case may be different, if the sum due to the wife is actually paid to him, the question then being, whether payment before the day is not a sufficient defence. In *Doswell v. Earle* (*a*), the wife was intitled to a trust fund, subject to her mother's life interest: the trustee, with the assent of the mother, paid it to the husband, who afterwards died before the mother, leaving his wife surviving: it was held that the latter was barred.

Another argument in favour of the opinion that the husband can assign the future choses in action of his wife, is drawn from a supposed analogy to his power over her interests in terms of years. But the right which the husband has in his wife's chattels real, is essentially different from that which he has in her choses in action. With respect to the latter, he acquires by the marriage only the right of suing for them jointly with her, and reducing them into his possession; but until they are reduced into possession the whole right is in her. If the husband dies first, her right continues; and if a suit has been commenced, his death does not cause an abatement, except under particular circumstances. (*b*) If she dies first, the right of action which the husband acquired by the marriage ceases: the property is still hers; the husband can only sue for it in the character of her administrator (*c*), and takes it subject to her debts. (*d*)

On the other hand, with respect to the wife's chattels real, he acquires a legal estate by the marriage; he may bring ejectment in his own name (*e*), and on her death this estate continues in him, in his own right, without taking out administration. (*f*) His power of assigning a legal interest in a term, is a legal power depending on the nature of his estate; his power of assigning an equitable interest in a term arises by analogy to his power over a corresponding legal interest (*g*); and hence, in either case, his assignment does not require a consideration to support it: its effect does not depend on contract.

(*a*) 12 Ves. 473.

(*d*) Ibid.

(*b*) Anon. 3 Atk. 725: *Coppin v.* [(*e*) *Vide supra*, vol. I. p. 109. of this —, 2 P. W. 496; *Mitford's Plead-treatise*.]

ings, p. 47.

[(*f*) Ibid. p. 95.]

(*c*) *Vide supra*, vol. I. p. 41. of this treatise.

[(*g*) Ibid. p. 99.]

But his assignment of a chose in action can only take effect as a contract. There is, therefore, no analogy between the cases.

The authorities do not settle how far the husband's power extends, with respect to those executory and contingent interests in legal terms of years which are not assignable at law, and with respect to corresponding equitable interests. According to Lampet's case (*a*), he may release them; but in that case the husband was alive at the time when the interest vested. An interest of this description resembles a chose in action in not being assignable at law; and therefore an assignment of it must, it is said, be for valuable consideration (*b*), and is treated as standing on the footing of an agreement. (*c*) It seems, therefore, that the question, whether the husband's assignment of such an interest will bind the wife surviving, depends upon principles similar to those which apply to his assignment of her future choses in action.

No. III.

Observations by Mr. Spence on the case of Hore v. Becher. (d)

THE following decision of the Vice-Chancellor of England, reported in the 12th vol. of Mr. Simons's Reports, p. 465, seems to us on many accounts to deserve particular attention.

Robert Becher executed a bond to A. Frazer and John Becher, in the penalty of 2000*l.*, conditioned for securing an annuity of 100*l.* a year to Mary A. Dickenson, spinster, for her life, and by a deed of even date, but which did not affect the question, he assigned to the obligees an annuity for another person's life, and a policy of insurance for further securing the annuity to M. A. Dickenson.

Afterwards M. A. Dickenson married John Turton. Then Robert Becher, the obligor, died, and his brother Richard Becher became his administrator. The annuity being in arrear, Mr. and Mrs. Turton threatened to commence proceedings at law and in equity against Richard Becher as the personal representative of Robert, and against Frazer and John Becher, the obligees, as trustees, to recover the arrears and enforce the future payment of the annuity. On this, all parties came to a compromise, and Mr. and Mrs. Turton executed a

(*a*) 10 Co. 46.

(*b*) 1 Atk. 280; 2 Atk. 208.

(*c*) Theobald v. Duffoy, 9 Mod. 102.

(*d*) *Vide supra*, vol. I. p. 75.

deed, whereby, in consideration of 500*l.* paid to them by John Becher they released Frazer and John Becher, the trustees, and Richard Becher, the administrator of Robert, the obligor, from all claims in respect of the annuity of 100*l.*, or the securities for the same. But the obligees did not release the bond to Robert, so that the *legal obligation* continued to be still subsisting.

The two obligees died; John Becher was the survivor. Mr. Turton also died, and his widow married S. Wood. A bill was then filed by Hore, the personal representative of John Becher the surviving obligee, and who had paid the 500*l.*, against Richard Becher, the personal representative of the obligor, and Mr. and Mrs. Wood; and one question was, whether it was competent to Mr. Turton to release his wife's annuity except during the coverture; if not, Mr. Wood, in right of his wife, would have been intitled to receive the arrears which accrued due from the death of Turton.

It was admitted in the argument, on the authority of *Stiffe v. Everitt* (a), that an assignment by Turton the husband would not have affected the payments to become due subsequently to his death, but the distinction was taken, that this was a *release*. His Honour decided that the release effectually destroyed the bond as against the wife. "If a man," said that very learned judge, "gives a bond or a promissory note to secure an annuity to a single woman, and she afterwards marries, her husband may release the bond or note, and if he releases the security, there is an end of the annuity;" and he seems to have considered that it made no difference that the wife was not herself the obligee.

Let us see how the case of a release by the husband of the wife's annuity stands *at law* where the wife was intitled to it *dum sola*.

Marriage is an absolute gift of all chattels personal in *possession* in the wife's own right, whether the husband survive the wife or not, but if they lie in action, as debts by obligation, contract, or otherwise, the husband shall not have them unless he *and his wife* recover them. (b) If the debt or duty is *presently* recoverable, there can be no doubt that the receipt of it (c) or a release (d) of it are equally available to bar the right of the wife, whether the securities be or not left outstanding, and of whatever nature they may be.

(a) 1 M. & C. 37.

(b) Co. Litt. 351, b.

(c) *Bosvil v. Brander*, 1 P. W. 458 :
Rees v. Keith, 11 Sim. 390.

(d) Dict. Lord Hardwicke, *Bates v. Dandy*, 2 Atk. 208, &c.

But does an annuity secured to the wife by bond stand in this predicament?

By the stat. 8 & 9 W. 3. c. 11. sec. 8, in all actions in any Court of record upon any bond, or in any penal sum for non-performance of any covenants or agreements contained in any deed, &c., the plaintiff may assign as many breaches as he shall see fit. The jury are to assess the damages for the breaches proved at the trial, and the like judgment (that is, for the entire penalty) is to be entered as before the Act, and the judgment is to remain as a further security to answer to the plaintiff such damages as he may sustain by any further breach and so *toties quoties*. This act, as is well known, is held to be compulsory on the plaintiff (a), so that he *must* assign breaches and take out execution accordingly; he cannot recover the entire penalty. A bond for payment of an annuity has been expressly held to be within the statute. (b) If any further breaches are committed, the act directs that the plaintiff may *toties quoties* sue out a *scire facias* upon the judgment.

If, therefore, husband and wife bring an action on a bond to secure an annuity given to the wife *dum sola*, and the wife must be joined, the action being in the name of both, the judgment must also be in the name of both. Even a judgment in the name of the husband without execution does not alter the property. (c) If so, who would be intitled to the *scire facias* after the death of the husband? Surely the wife, and not the personal representative of the husband. What, then, would be the effect at law of the release of the husband either before or after action brought? A release of all manner of demand, says Littleton (d), is the *best* release to him to whom the action is made. But the husband, as it would appear, has no demand for any payment of the annuity other than those that are due or may become due during his life. The statute prevents his recovering the entire penalty. The release of the husband, then, as it appears to us, can only release that which he can demand and enforce, namely, the arrears and accruing payments during his life. A release of all claims does not discharge rent before it is due. (e) To say that the husband can release the bond or the penalty itself, when another person besides himself, namely, the wife surviving, may in a certain event have an

(a) Serj. Williams's note to Gainsford v. Griffith, 1 Saund. 58.

(d) Sec. 508, Co. Litt. 291, b.

(b) Collins v. Collins, 2 Burr. 820: Walcot v. Goulding, 8 T. R. 126.

(e) 1 Sid. 141: note 251 to Co. Litt.: Co. Litt. 292, b, is to the same effect.

(c) Eden's note to Heygate v. Annesley, 3 Bro. C. C. 362.

interest in it, which interest he cannot, as it appears, by any means reduce into possession, appears to be to assume the question.

But there is what appears to us an express decision on the point. In the case of *Thomson v. Butler* (*a*), which L. C. B. Comyn, of himself authority, has entered in his Digest (*b*), it was decided, to use his language, "that if the wife has an annuity for life, a release by the husband does not bind the wife if she survives." It is true that the annuity in that case *may* have been secured on land (*c*), and the circumstance noticed by Mr. Jacob (*d*), that the action was by writ of annuity, is not conclusive against this supposition, for a person has the option of bringing a writ of annuity to charge the person, though the annuity be secured on land with power of distress. (*e*) The probabilities, however, are that it was not so secured. So important a circumstance would hardly have been omitted in the report, if it had existed, and had influenced the judgment of the Court. A better mode of getting rid of the effect of that case perhaps would have been to cite against it Lord Holt's dictum to the contrary in the case of *Cage v. Acton* (*f*), but which is very much weakened by Lord Kenyon's observation (*g*) in his argument on the principal point of the case, on which the two other judges differed with him in opinion.

If our view, as above stated, be correct, what equity had the plaintiff in *Hore v. Becher* to be relieved from his obligation to enforce the bond for the benefit of the wife? If we are right, even if the wife had been the obligee, the release would not have bound the wife surviving. In the case before us, the wife was not the obligee; *ex concessis*, the legal obligation remained as far as the obligees were concerned: the release was not made *by* but *to* them; indeed it *was* owing to this circumstance that the bill was filed. The very same reasons that would have operated to prevent the obligor from taking advantage of the release ought surely to have prevailed as regards the obligee, called upon by his *cestui que* trust to enforce the bond against the obligor.

It will be seen that our view of the case of *Hore v. Becher* is wholly

(*a*) Moore Rep. 522.

(*b*) Title Baron & Feme, K.

(*c*) See Judg. of the Vice-Chancellor in *Hore v. Becher*.

(*d*) 2 Roper's Husband and Wife, p. 518. [*antè*, p. 432.]

(*e*) Littleton, sec. 219: Bac. Abr. tit. Annuity, C.; vol. I. p. 240, 7th ed.

(*f*) 1 Freeman, 512, and in several other books.

(*g*) Milbourn v. Ewart, 5 T. R. 384: see 2 Rop. H. & W., addenda by Jacob, pp. 518, 519. [*antè*, p. 432.]

irrespective of the doctrine that he who asks for equity must do equity,—a principle which was not adverted to in the case before us. In our view, neither the plaintiff nor the obligor had *any equity*. But if they had, still we cannot but think that the wife had at least an equal equity; if so, why did the Court interfere? Besides, in *Sturgis v. Champneys (a)*, Lady Champneys was allowed a provision, as against the insolvent assignee, out of the rents and profits of her estate, to which the insolvent her husband was *presently* intitled; and though it was purely from an accident (*b*) that the assignee was compelled to come into equity, so in *Hore v. Becher*, the wife was claiming accruing payments, to which, as such, the husband never could have been intitled; and the legal interest was outstanding, not by accident, as in *Sturgis v. Champneys*, but by virtue of the original contract; yet as the case stands, the widow was not considered as intitled even to a provision. It is to be observed, however, that this point was not expressly made.

Had the *entire penalty* of the bond been *paid* to the obligees, and by them to the husband, it might have been contended, on the authority of the case of *Doswell v. Earle (c)*, that such an anticipatory payment was a good reduction into possession; and in the case before us the obligor might possibly have claimed to have so much of the 500*l.* allowed to him as would cover any arrears, whether they accrued during his own life or that of his wife. In this way, assuming that the 500*l.* was not exhausted by arrears accrued during the husband's life, the obligor, and through him the plaintiff, might have had *some* equity; but even in this view, it is to be remarked that in the last-cited case the reversionary payment which the trustees were held to have paid to the husband in a proper exercise of *their discretion* might have come into possession *in the lifetime of the husband*; here the payments, which would never accrue to the wife surviving, never could. With these observations we leave the case, and our reasons for not acquiescing in it, to the consideration of the Profession, sincerely hoping, as is almost certain from the extensive legal acquirements of the distinguished judge who decided the case, that the difficulties we have advanced arise from some misapprehension on our parts, the detection of which we have endeavoured to facilitate; so that others may be prevented from being assailed by the same doubts and difficulties, if they should prove to be unfounded.

(a) 5 My. & Cr. 102.

(c) 12 Ves. 474.

(b) See 5 My. & Cr. 101.

No. IV.

Of the Effect upon the Wife's Title by Survivorship of her Husband's Assignment, or the Law's Transfer of her Choses in Action which are immediately recoverable, or are in remainder or expectancy.
By Mr. Roper. (a)

1. IN the first section of this chapter it was noticed that the husband might absolutely dispose of all such of his wife's personal estate over which the common law imparted to him the power; and in the same section some particulars of property were described, of which good and effectual *legal* assignments might be made.

Of such parts, therefore, of the wife's personal estate, whether in possession or remainder, to which her husband's assignment passes a complete *legal* title, the conveyance will bind his wife although she survive him; and it will make no difference whether the assignees claim under acts of parliament, or under assignments made by himself for or without value; because by such dispositions the contingent interest of the wife is destroyed, and there is no equity for her against the legal consequences of these transactions, for *æquitas sequitur legem*.

And in those instances, although the husband die before his assignees recover the property assigned to them, they will, nevertheless for the reason last mentioned, have a right to recover and enjoy it against any claim of the widow in respect of her general title by survivorship. (b)

But when the property of the wife assigned by her husband is not of *legal* cognizance, but merely *equitable*, so that the assignment of it can only be enforced in a Court of Equity; in such and the like cases the assignees of the husband-bankrupt, or his assignees claiming under the insolvent debtor's acts, or his assignees under a deed of trust to pay his debts (c), take the property subject to all the wife's equities upon it against her husband. (d)

This proposition may be now considered as established by the

(a) *Vide supra*, vol. I. p. 83. This discussion formed part of chap. 6 of Mr. Roper's treatise (1 *Rop. H. & W.* p. 227—255).

(b) 2 *Ves. Jun.* 608—682.

(c) See *Pryor v. Hill*, 4 *Bro. C. C.* 139; 2 *Atk.* 422. If the trust deed be

for payment of creditors, who execute it and release the debtor, it seems to stand on the same footing as any other assignment for valuable consideration. See 11 *Ves.* 620.

(d) 2 *Dick.* 491; 2 *Madd.* 16.

solemn decision of Sir Willam Grant, M. R., in *Mitford v. Mitford* (a); but previously to it, so strong was the opinion that the effect of assignments by the acts of law would bar the wife's right by survivorship to her choses in action, whether immediately recoverable, or in reversion or expectancy, that the soundness of his Honour's judgment has not been generally considered as unimpeachable. The case of *Mitford v. Mitford* was to the following effect:—

A bequeathed 3000*l.* to trustees to place at interest, and to pay such interest to B for life or until she married; and upon her death or marriage A gave the capital amongst C and D, and E the wife of M, equally. M, the husband of E, became a bankrupt, obtained his certificate and died, leaving his wife E surviving: B afterwards married. The question, which was raised upon the bill of the surviving trustee, was whether, notwithstanding the bankruptcy, the wife was or was not intitled by right of survivorship to her share of the 3000*l.*, which had been invested in 4 *per cent.* consols? And Sir William Grant, M. R., after a review of all the cases, decided in favour of the wife, upon the principle, that this being a chose in action and not reduced into possession during the husband's life, survived to her; and that an assignment under a commission of bankruptcy, although it passed her share, passed it to the assignees *sub modo*, viz. provided they received the share or its value during the marriage, and that the commission or assignment did not of itself necessarily intercept the wife's right of survivorship. (b)

It is observable in this case, that the subject was solely within the jurisdiction of equity, and that the assignees had no remedy but by means of the Court of Chancery; which Court, in analogy to the rule of law, decreed, that as neither the husband nor his assignees had, during his life, reduced the wife's share into possession by sale or otherwise, it necessarily survived to her upon his death. It is conceived, therefore, that there is no solid reason for disputing the propriety of the decision.

With respect to *Bosvill v. Brander* (c), one of the cases supposed to militate against the above authority, it is to be observed that Sir Joseph Jekyll, M. R., after much discussion and great consideration, at first decided in favour of the wife, and afterwards against her; so

(a) 9 Ves. 87.

(c) 1 P. W. 458.

(b) S. P. Parker v. Dykes, 1 Eq. Ca.

Ab. 54: Gayner v. Wilkinson, 2 Dick. 491; 1 Bro. C. C. 50, n.

that it contains decisions both ways, and shows the unsettled state of that Judge's mind upon this subject. The property was a mortgage in fee belonging to the wife, the title deeds were in the hands of the assignees, and the widow filed a bill for them, and to have the benefit of the mortgage. And the Master of the Rolls seems to have considered it a material feature in the case that the suit was *by* and not against the widow (a circumstance at present of no consideration), as afterwards will appear. His Honour admitted the general principle, that the assignees claiming under the husband could not be in a better situation than the husband would have been: the necessary consequence of which one would have supposed to have been a decree, that as the husband's interest was subject to the wife's right of survivorship, so it should be in the hands of his assignees; and that since neither he nor they in his lifetime reduced the debt into possession, it necessarily survived to the wife, according to the first decision. Under such circumstances, it is conceived that this case cannot be fairly adduced to impeach the decision in *Mitford v. Mitford*. And as to the case of *Miles v. Williams* (a), another of those cases, the only point decided was, that the husband's certificate under his bankruptcy, if well pleaded, would have been a bar to an action brought against him and his wife upon a bond given by her before marriage; so that the present question was not there decided. And with respect to *Pringle v. Hodgson* (b), the last of those cases, Lord Rosslyn probably considered *stock*, which stood in the wife's name at the time of the marriage, as *not* being either in the nature of a chose in action, or an *equitable* interest, and that such impression produced the decree in that case against the wife in favour of the assignees. These two latter cases, therefore, do not appear to shake the solidity of the decision in *Mitford v. Mitford*, which was a determination upon the wife's reversionary interest (c), and the property could not be reduced into possession in the ordinary acceptation of those terms. Sir William Grant's observation, that the wife's property being a chose in action and not reduced into possession during the husband's life, survived to his wife, must, it is presumed, be considered in an extensive sense, importing that the assignees having neither reduced the property

(a) 1 P. W. 249.

(b) 3 Ves. 617. In this case the legal right to the stock had been changed by a transfer from the wife's name to trustees.

(c) The interest was reversionary at the time of the bankruptcy, but by the marriage of Charlotte Mitford it became a present interest before the husband's death.

into their possession (which in this case they had not the opportunity of doing), nor *disposed* of it for value in the lifetime of the husband; since the wife, therefore, would have been intitled to it against the representatives of her husband, she was equally so intitled against his assignees in bankruptcy. This interpretation of the expression of the Master of the Rolls is founded upon what has been before said in regard to the husband's legal power over his wife's personal estate, where it appeared that his assignment of her real chattels, whether in possession or remainder, intercepted at law her title by survivorship (*a*), and that Courts of Equity, acting in analogy to the legal rule, enforced against his wife surviving him his *agreement* to mortgage or assign them. (*b*)

2. If, then, Courts of Equity pursue the legal analogy, it seems to follow, that, since the husband is enabled at law to *release* his wife's choses in action, in which he has an *immediate* interest (*c*), or an interest expectant upon an event which may by possibility happen during the marriage (*d*), that class of his assignees before described will have a right to dispose of such choses in action for value, if the disposition be made during the coverture, and that it will defeat the wife's title by survivorship. (*e*)

But it must be noticed that sales of *reversionary* interest are almost rendered impracticable, from an understanding that dispositions of them by private contract will in general be set aside for the least inadequacy of price, and that proof of the full value lies upon the purchaser, *i. e.* he must prove that fact, without the vendor being required to show the contrary. This, however, seems to be a mistake; for all, or the great majority of the cases, merely establish this doctrine in instances of *expectant* heirs, or of persons who may be considered to be adopted as such from their relation to the family. (*f*)

The principle is public policy, in order to prevent deception upon parents and ancestors, no parties to the transactions; and who, in ignorance of them, are induced to leave their properties to be divided among usurers and common adventurers, instead of their heirs, whom they intended to be beneficial inheritors and successors to their

(*a*) Chap. 5. sect. 2.

(*b*) Mr. Roper refers to vol. ii. of his treatise, p. 177.

(*c*) Touchst. 333; 2 Roll. Abr. 410, pl. 50.

(*d*) 2 Roll. Rep. 134; Gilb. Eq. Rep. 88; 1 Salk. 327.

(*e*) 2 P. W. 608; 9 Mod. 102.

(*f*) 9 Ves. 246; 16 Ves. 512; 17 Ves. 20; 3 Ves. & Bea. 117.

fortunes. But this exception of expectant heirs out of ordinary cases appears to have been opposed by some learned judges; and I think that it will be found, upon examining the authorities prior to Peacock and Evans, after referred to, that, whatever might have been the *dicta* of judges, the cases were decided not upon inadequacy of value only, but upon gross frauds and impositions, which ought, and would have set aside any contracts. (a) In *Curwin v. Miller* (b) Lord King relieved the heir. That case is very shortly reported, and may have omitted to state many particulars. In *Chesterfield v. Janson* (c), which was decided upon the subsequent confirmation of the original transaction, Burnet, J., said, it might be too rigid to say that an heir should not borrow upon an expectancy, as some persons are so niggardly and sparing to their children, that a poor heir might starve in the *Desert* with the land of *Canaan* in his view, if he could not relieve himself by borrowing upon an expectancy; but as modern authorities (d) have established that although an expectant heir may mortgage or sell his expectancy, yet if the full value be not obtained the transaction shall be void, the consequence of this rule is to exclude the fair and honest purchaser, who will not run such a risk, and to admit the usurer, and rapacious money-lender, who will incur it, but only upon the most exorbitant terms; so that the severity and *uncertainty* of the rule defeats its own end. Probably, the more effectual principle would have been, to have established the contract of the heir in all cases where it would have been binding upon other persons, and to have relieved him when and when only undue advantage had been taken of his necessities, and a gross unconscionable bargain had been made with him. In *Hill v. Caillovel* (e), which was the case of a son aged twenty-four, who gave his bond for the payment of 520*l.* within six months after the death of his father, then of the age of seventy, Lord Hardwicke observed that the circumstances were *suspicious*, but intimated that he could not relieve against the transaction *without proof of imposition*. Great inconvenience in practice, and much litigation, have arisen from the law being established as above; and it is considered impossible to recommend a purchaser

(a) *Nott v. Hill*, and *Bill v. Price*, 1 Vern. 167. 467: *Barney v. Tyson*, 2 Vent. 359: *Ardglasse v. Muschamp*, 1 Vern. 237: *Lamplugh v. Smith*, 2 Vern. 77: *Berny v. Pitt*, 2 Vern. 14: and *Twisleton v. Griffith*, 1 P. W. 310.

(b) 3 P. W. 292, *note*.

(c) 1 Atk. 301.

(d) *Evans v. Chesshire*, Belt's Supp. to Ves. Sen. 300; *Peacock and Evans*, 16 Ves. 512: *Gowland v. De Faria*, 17 Ves. Jun. 20: *Bowes v. Heapes*, 3 Ves. & Bea. 117.

(e) 1 Ves. Sen. 122.

to accept a title that depends upon so uncertain a calculation as the price being the full value of the reversion, which is left to the opinion of a judge in each particular case, and upon which it may frequently happen that any two or more persons may disagree; so that at present Burnet's observation is realised, that the expectant heir must either starve in the sight of *Canaan*, or fall into the hands of rapacious money-lenders, except the Court should relax the rule in the instances after mentioned of sales by public auction, although not so productive as *bonâ fide* sales by private contract. The inconvenience felt in this instance, from the uncertainty of the law as applicable to each case, shows the propriety of all the rules of law being made clear, and followed in all cases to which they apply, until an alteration be made with the concurrence of all or the majority of the proper Judges. Experience has proved the truth of the proposition, that *miserâ servitûs est ubi lex est vaga*; and it has been ascertained by the same unerring test that there is less inconvenience in acting upon an unsatisfactory principle which has acquired the force of law by decisions, than when the private opinion or views of a single judge have induced him to set at nought the determinations of his predecessors and the opinions of his cotemporaries, and to decide against them.

It is presumed that the cases do not extend to instances where the persons intitled to remainders or reversions are not the expectant heirs, or from their relation to the family are not to be considered in the same character.

Thus, in the case of *Gwynne v. Heaton* (a), Lord Thurlow said, that "a remainder-man might sell or give away his remainder, and the Court will not take it away from the purchaser or donee; that an inadequate consideration is *not alone* sufficient to vitiate the contract, although in order to do so it must be inadequate. Where it is sold for a sum *grossly* inadequate, the Court has never suffered it to stand."

In *Batty v. Lloyd* (b), the defendant agreed with the plaintiff, intitled to an estate after the death of two old women, to give to her 350*l.*, in consideration of being paid 700*l.* at the deaths of these two old women; and the plaintiff was to secure the 700*l.* upon a mortgage of her *reversionary* estate. The women died two years afterwards, and the suit was instituted to be relieved against the bargain; but the Court refused to interfere, observing that nothing ill appeared in the transaction.

(a) 1 Bro. C. C. 6.

(b) 1 Vern. 141.

And in *Cole v. Gibbons* (a), Lord Talbot took the distinction between young heirs and other persons.

The conclusion to be drawn from the old and new cases seems to be this:—that the heir may sell or incumber his reversionary or expectant property by private contract, if the sale be for the full value, or if the incumbrance be made upon fair terms.

And probably it may be considered, that a stranger may sell his remainder or reversion for the best price which he can get, although it may be at an undervalue, if there be no fraud or imposition. I have used the word “probably,” in consequence of the general impression that the reversionary interests of no persons can be sold by private contract, except at their utmost value. There are indeed numerous *dicta* in support of that impression, but I find no case distinctly determined to that effect. The instance of an expectant heir was the first exception to a person’s power of free disposition of his property upon the principle before stated. That principle was next extended to the more immediate members of the family, under the supposition, as it is conceived, of the reversionary interest being intended as a portion or provision, and therefore within the principle of the expectant heir. Thus far the cases have advanced, and, as I believe, no farther. When, therefore, the inconvenience of the exception which has been established is considered, and its insufficiency to answer the end of its formation, and the general sentiment in disfavour of, it may not be considered as too speculative or rash to suppose that when the question comes fairly before the Court upon the validity of the sale of a reversionary interest belonging to a stranger, the contract will not be vitiated from mere inadequacy of consideration alone, and which would not avoid it in general instances. It appears before that there is no want of authority for such a determination: the *dictum* of Lord Thurlow and the decrees of Lord Hardwicke and North, Lord Keeper, may be considered a sufficient foundation upon which to build such a decree.

The cases have not proceeded to the length of avoiding sales by expectant heirs of their reversionary interests by *public auction*. Perhaps the money arising from such sales, and upon fair competition, would be considered the value of the property, and bind the heir; since it might reasonably be presumed in such transactions, and in the absence of proof to the contrary, that there was no imposition, no

undue advantage taken of his necessities, and therefore that such sales did not fall within the modern authorities before referred to.

Considering that a married woman is under the special protection of a Court of Equity in respect of her equitable property; in sales, therefore, of her reversionary interests by the husband or his assignees in bankruptcy, &c., it may be thought the most eligible method to do so by public auction. (a) (b)

(a) Since writing the above observations I have been favoured with the manuscript of a case preparing for the press by Mr. Maddock, in which a sale by public auction of a reversionary interest by an expectant heir was established by the present Vice-Chancellor. The case was *Shelley v. Nash*.* The plaintiff was intitled to the reversion of 8000*l.* sterling upon the death of the survivor of his father and grandfather; the former of the age of sixty, and the latter of eighty or near ninety, the plaintiff being twenty-two. The plaintiff advertised his reversion to be sold by public auction in March, 1814, at which time the sale took place, and the defendants were declared the highest bidders at the sum of 2593*l.* 10*s.* The grandfather died in January, 1815. The object of the bill was, that the heir should be relieved against the sale. Morgan, the actuary, deposed that at the time of the sale the reversion was worth 3540*l.*, and that 5860*l.* only ought to have been secured to be paid upon the happening of the contingency, in consideration of the sum of 2593*l.* 10*s.* Frend, another actuary, was of opinion that 3653*l.* was the fair price of the contingency, but said that in and since July, 1814, a great change had taken place in the value of money, and that he considered 2561*l.* 10*s.* in and since that month to be the value of the reversion of 8000*l.*; and that had he been asked in the above month what might be expected for the advance of 2593*l.* 10*s.*, he should have replied 8099*l.*; and he observed, that in contracts of the

like nature, the *contingency of a lawsuit* must be taken into consideration. His Honour decided in favour of the bargain, and dismissed the bill *with costs*, observing, that the principle of the rule laid down by the modern cases could not be applied to sales of reversions by *auction*; that sale by auction was *evidence* of the market price; and *pretended* sale by auction to cover *private* bargains would operate nothing. — *Note by Mr. Roper.*

(b) On the subject of transactions relating to reversionary interests, see *Davis v. Duke of Marlborough*, 2 Swan. 108, and Mr. Swanston's note, p. 139.

Notwithstanding the case of *Shelley v. Nash*, sales by auction of reversionary interests will not in all cases be supported. In *Fox v. Wright*, 6 Madd. 111, affirmed by the Lord Chancellor on appeal, the Court interfered by injunction against a *post obit* bond, which had been sold by auction. — *Note by Mr. Jacob.*

[To the above cases Mr. Jacob adds those of *Ryle v. Swindells*, *M'Clelland's Exch. R.* 519, and *Headen v. Rosher*, 1 *M'Clelland & You.* 89. In the latter case the L. C. B. said that he could not bring himself to adopt the principle laid down in *Gowland v. De Faria*, 17 Ves. 27; and he held that a private sale of a reversionary interest was not to be set aside on the ground that the price paid was less than the full value as calculated by an actuary. To these cases may be added those of *Wardle v. Carter*, 7 Sim. 490; *E. Portmore v. Taylor*, 4 Sim. 182; *Addis v. Campbell*, 4 Beav. 401

* 28th May, 1818. Since reported, 3 Madd. 232.

If, then, such assignees are able, by their assignment for value, to bar the wife's title by survivorship to her own reversionary choses in action, for the reasons before given, it follows that —

3. An assignee for the husband, for a valuable consideration of the wife's choses in action, whether they be immediately recoverable, or be in remainder, or expectant upon an event which may possibly happen during the marriage, will also be intitled to hold them against the wife's claim by survivorship.

The reader must consider the power of the husband, to assign for value his wife's reversionary choses in action, as a point not yet finally settled. The opinions of most of the modern equity judges have been doubtful upon the subject; but I am not aware of any judicial opinion or decision, that the assignee could not retain his purchase against the wife's title by survivorship, except the determination of the present Master of the Rolls, in the case after stated; and a *dictum* of Sir William Grant, M. R., that a husband can dispose of his wife's property in expectancy against every one but his wife surviving him. (a) On the contrary side of the question stand the names of Lords Hardwicke, King, and Alvanley; as will appear from the remarks which will be made upon the decision of Sir Thomas Plumer, in *Hornsby v. Lee*. (b)

In that case, the wife was intitled to certain trust-stock upon the death of her mother; and she and her husband assigned it to secure an annuity granted by him. The husband took the benefit of the insolvent debtors' acts, and a general assignment of his property was made. The mother then died, and afterwards the husband, without any act having been done by him or his assignees during the mother's life (c) to reduce the fund into possession. The question was, between the wife, *the grantee of the annuity*, and the assignee under the insolvent debtors' acts: and Sir Thomas Plumer decreed the trust fund to the wife against the annuitant, because the assignment (although made for *value* to a *particular* assignee) did not bind the

King v. Hamlet, 4 Sim. 223; S. C. 2 M. & K. 456; 9 Bligh, N. R. 575; 3 Cl. & F. 218: Potts v. Curtis, Younge Eq. Ex. 556: Hinckesman v. Smith, 3 Russ. 433: Newton v. Hunt, 5 Sim. 511: Bernal v. M. of Donegal, 1 Bligh, N. S. 594: Edwards v. Bown, 2 Coll.

N. C. 100; 2 Eq. R. 62: Davies v. Cooper, 5 M. & C. 270: and see 1 Sug. V. & P. 444, 10th ed.]

(a) 1 Vcs. & Bea. 405.

(b) 2 Madd. 16.

(c) See 2 Dick. 491.

wife's right of survivorship. And he decided against the assignee under the insolvent debtors acts, because the assignment had no greater effect than that in bankruptcy, which has been before considered.

Sir Thomas Plumer's decree against the annuitant is, I believe, the first decision that the *reversionary* interests of the wife in choses in action cannot be assigned by her husband, even for value, so as to bar her title by survivorship. This judgment, then, purporting to settle a new point of equity, the reader will reasonably expect that it should not be passed over in silence, especially when so much doubt had previously been entertained upon the subject. His Honour's decision against the annuitant was made upon the principle, that a *particular* assignee of the husband cannot be in a better situation than his assignees under a general assignment in bankruptcy. But, with all due respect to so high an authority, it is conceived, that it will be difficult to apply that principle to the two cases; for assignees in bankruptcy are merely placed in the situation of the husband, by the assignment, under the directions of the statutes, with his rights and powers; but his assignee for a valuable consideration claims under the *execution* of his legal power; the latter assignee, therefore, is not in the same situation as general assignees in bankruptcy, but his case resembles that of the assignee for value of such general assignees: hence, if the husband's assignee for value have a good title in equity against the wife, it follows that the assignee claiming under the husband's assignees in bankruptcy must have a similar title. The simple question appears to be, Has the husband a power to assign, for a valuable consideration, his wife's choses in action, so as to bind her, surviving him? In attempting to answer this question, it is necessary to consider the husband's power at the common law over this species of property, and his power over it in equity.

With respect to his power at law, it was asked, in *Hornsby v. Lee*, if a deed assigning a reversionary interest was a reduction of it into possession? The answer must be, surely not: it is not an actual receipt of the thing itself, although it certainly is of its *value*.

But there are other methods by law besides *actual* reduction into possession, by which the husband is allowed to exercise his legal right over his wife's choses in action, and to defeat her title by survivorship, viz. the disposition of her *interest* in such of them as are *legally* transferable by *assignment*, without any distinction whether the interest be

immediate or in remainder (*a*); and the passing or extinguishment of her interest in such of them as are not assignable, by his *release*. The husband's power to assign at law his wife's terms for years, whether in possession or in remainder, and his power to do the same by contract in equity, in analogy to his legal right, has been before shown (*b*); but his power of releasing his wife's choses in action, whether her interest in them be immediate or in expectancy, has not been regularly detailed.

The interest acquired by the husband, upon his marriage, in the debts due to his wife, enables him to release them so as to bind her. (*c*)

So also he may release all rights accruing to her during the marriage. (*d*)

That the husband may release his wife's legacy, although she die before the arrival of the time of payment, appears from an *anonymous* case in Rolle's Reports. (*e*) It seems that the husband was the survivor; but the observation of the Court may be considered as a general one, and to be equally applicable if she had survived him. The Court said, "The husband has an *interest* in the legacy *before* the time of payment accrues, which *interest* it is *clear* that he might have released previously to the period of the money becoming payable." A similar interest he has in his wife's choses in action, in remainder or expectancy, which may *possibly* fall in during the marriage; and there appears to be no solid reason why they also should not be within his power of releasing. Accordingly, in *Gage v. Acton* (*f*), Holt, C. J., expressed himself to the following effect: — "that when the wife has *any* right or duty which by *possibility* may happen to accrue during the marriage, the husband may by *release* discharge it; but where she has a right or duty which by *no* possibility can accrue to her during the coverture, there the husband cannot release it."

The exception to the husband's power proves the existence of it at law in the other instances; and the following are examples of the exception: —

If a lease were made to the husband and wife for their lives, and to the *executors* of the *survivors*, the husband could not release or

(*a*) Mr. Roper refers to chap. 5, sec. 2, pl. 3. of his treatise.

(*b*) See last reference.

(*c*) 2 Roll. Abr. 410.

(*d*) Touchst. 333.

(*e*) 2 Roll. 134: and see 10 Rep. 51 *b*.

(*f*) 1 Salk. 327; 1 Com. Rep. 67; 1 Ld. Raym. 515, S. C.

dispose of the remainder, against the title of his wife surviving him, because it could not possibly come into possession during the marriage, and the wife's interest or chance was a mere possibility. (a) Again,

Suppose a person undertook to pay or bequeath to B 100*l.* if B survived C, her husband, or if a bond had been given to the wife *dum sola* to the like effect, the release or assignment of C, or his marriage with B, would not affect B's right to the money upon surviving her husband. (b) But if the wife had been possessed or intitled to the residue of a term for years, upon the determination of an interest for years carved out of it; or if the 100*l.* had been payable to the wife upon an event which might have happened during the marriage, her husband might have assigned and released them at law.

Such being the husband's power over his wife's choses in action, in remainder or expectancy, as given to him by the law, the next inquiry is, will Courts of Equity pursue the *legal* analogy in relation to equitable assignments by him of her reversionary choses in action, as we have seen that they have done in instances of his agreements to dispose of or pledge them when the wife's interest was immediate or present? (c) This can only be determined, upon consideration of what a Court of Equity has done, and the opinions of its Judges; but before I proceed, I shall submit this remark to the reader, whether there be any reason suggesting itself to his mind, why the Court should act in analogy to the law, where the husband's contract is to dispose of his wife's choses in action when her interest is immediate; and then to stop short and not pursue the analogy, and hold the same language where the agreement is to dispose of her reversionary interest which may fall into possession during the coverture. We shall first begin with the *opinions* which have been expressed upon the subject.

In the *Duke of Chandos v. Talbot* (d), Lord King expressed himself thus: "It has been determined that the *possibility* of a term (viz. where a term was devised to A for life, remainder to B for the residue of it) might be assigned even by the husband *alone*, as appears from the case of *Theobald v. Duffoy* (e); a decree by Lord Macclesfield,

(a) 2 Roll. Abr. 48; 10 Rep. 51; Touchst. 344.

(b) *Belcher v. Hudson*, Cro. Jac. 222; and *Gage v. Acton*, 1 Salk. 326; Hob. 216; Cro. Jac. 571.

(c) See *suprà*.

(d) 2 P. W. 608.

(e) 9 Mod. 102.

which was afterwards confirmed by the then present Chancellor, and finally by the House of Lords. But were it (a legacy payable to the wife at her age of twenty-five) not in strictness to operate by way of assignment, yet it would be *good* as an agreement; especially when made for a *valuable* consideration."

In *Grey v. Kentish* (a), Lord Hardwicke expressed his opinion as follows: — "A husband cannot assign in law a *possibility* of his wife; but this Court will, notwithstanding, support such an assignment for a *valuable* consideration." And in a subsequent case of *Hawkins v. Obyn* (b), his Lordship gave a similar opinion, in relation to the husband's power to assign the possibility of his wife for *value*.

Lord Alvanley's opinion must have been the same, in regard to the husband's power over his wife's reversionary interest, when he pronounced his decrees in *Hewitt v. Crowcher*, and *Greg v. Crowcher* (c); for unless the husband had the power of assigning it for value, the wife's examination and consent in Court to the transaction would doubtless not have been received.

With respect to decisions upon the subject, I have found none previously to the modern case of *Hornsby v. Lee*, except one, which seems to show the habit or practice of the Court in these instances so long ago as in the beginning of the reign of George the First, and that it was founded in analogy to the husband's power at law to extinguish or release his wife's reversionary choses in action.

The case alluded to is *Atkins v. Dawbury* (d), in which the wife was intitled to a legacy, payable out of lands, upon the death of a tenant for life. Her husband, during the lifetime of the tenant for life, assigned the legacy to trustees for the benefit of his children. After his death the life estate determined, and the legacy became payable; and upon the bill of the children for the money, it was decreed, that since the husband, who had a power to extinguish or *release* the legacy, had made a good assignment of it in equity (although as a chose in action it was not assignable at law), it was actually recovered, *i. e.* it was actually recovered against the wife's title by survivorship.

The peculiarity of the above case is, that the assignment may be considered *voluntary* (e); a consideration upon which it has been before shown a Court of Equity will not interfere in those instance

(a) 1 Atk. 280, ed. by Sanders.

(b) 2 Atk. 551.

(c) See 12 Ves. 175.

(d) Gilb. Eq. Rep. 88.

(e) See *Becket v. Becket*, 1 Dick. 340

against the title of the wife, but the principle of the decision shows clearly the husband's power in equity, in analogy to law, to bind his wife's right of survivorship to her reversionary interests by an equitable assignment for a valuable consideration. Probably, the following proposition may be considered as warranted from what has been said, — that whenever the nature of the wife's interest is such as the law allows the husband to release it, a Court of Equity will permit him to assign it for value.

The cases which have been adduced to show that the husband cannot bind his wife's reversionary interests by a particular assignment for a valuable consideration, are either upon questions between her and general assignees under her husband's bankruptcy; or, in instances where there were no decisions upon the point, and the Court merely declined to act upon his wife's consent so as to prejudice the question of her title by survivorship before the period arrived when it would arise, viz. upon her husband's death, as will appear from the cases after stated.

In *Grey v. Kentish* (a), the wife was intitled to a share of South Sea annuities subject to her mother's life interest, and to the contingency of her (the wife) being living at her mother's death. The husband became a bankrupt, and died *before* the mother. His wife petitioned, as surviving him and her mother, to have the share transferred to her; and Lord Hardwicke so ordered against the assignees under the bankruptcy; and upon the principle, as it would seem, before stated, in regard to such class of assignees. (b) No particular objection was taken to their claims, on the ground that this was a contingent reversionary interest; nevertheless his Lordship declared, as it was before observed, that although the husband could not at law assign a *possibility* belonging to his wife, yet that a Court of Equity would support such an assignment for a valuable consideration.

Gayner v. Wilkinson (c), before Lord Bathurst, was another case between the surviving wife and the assignees of her husband. The wife was intitled to a share in a sum of money expectant upon the death of A, if the wife were then living. The husband became a bankrupt, and died, *after surviving A*, leaving his wife the survivor. The share was decreed to belong to the wife by his Lordship dismissing the bill against the assignees; but the decree was made, as it would seem, upon the principle, that no act had been done in the

(a) 1 Atk. 280, ed. by Sanders.

(c) 2 Dick. 491; 1 Bro. C. C. 50. S. C.

(b) Mr. Roper refers to vol. i. p. 227. in notes.
of his treatise.

husband's lifetime to reduce the fund into possession, as he or his assignees had power to do after the death of A, and not upon the inability of the husband or his assignees to assign the same for value to bind the wife's right by survivorship.

In considering the unsettled question, when the wife will be permitted to consent in Court as to the disposal of her reversionary personal property, those cases which relate to personal estate settled to her separate use and appointment must for the present be excluded, since the principles applicable to them do not apply to this inquiry. — Suppose, then, a married woman to be intitled to personal property, or to the interest of it, absolutely or for life, after the death of A; can she, during her marriage with B, consent to the disposition by her husband of her interest against her own title in the event of surviving him? In the most modern cases, her power to do so has been doubted. In other cases her consent has been taken, and no doubt entertained of her having that power; but some of them it is conceived have gone farther than any principle can warrant.

It is presumed that the principle applicable to correct determinations upon this subject is this—that when property is so given to the wife, either in remainder or contingency, as that the husband may release it at law (*a*), as in the instance above supposed; if he assign it for *value*, the assignment will bind the wife in equity; so that her consent, by way of confirmation and to waive her title to a settlement, ought upon such principle to be received and recorded. But that when the wife's consent is offered to pass her reversionary interest in analogy to a fine at common law, in favour of the husband or his assignee, without a valuable consideration, the Court must decline to receive it, because no analogy between the two acts exists (*b*), they differing both in forms and principles; and because the property is not assignable at law, and there is no consideration to induce a Court of Equity to act or interfere. (*c*)

It is probably to the want of attention to this distinction that the discordant adjudications to be found in the cases may be attributed.

The above principle will support Lord Alvanley's decree in *Hewitt v. Crowcher* (*d*), in the year 1800, which states that the wife being present in Court and examined, and desiring that the contract should

(*a*) 2 Roll. Rep. 134; *et vide antè*, p. 238. [p. 449 of this vol.]

(*b*) 10 Ves. 587; 8 Ves. 174.

(*c*) On this subject see *Ritchie v.*

Broadbent, 2 Jac. & Walk. 456: Howard *v.* Damiani, *ibid.* 458 *n.*: Breton *v.* Lord Clifden, 1 Sim. & Stu. 363.

(*d*) Stated 12 Ves. Jun. 175.

be carried into execution, it was decreed accordingly. But such principle will not support the case of *Butler v. Duncombe* (a), in which the Court ordered upon the examination of the wife a moiety of her portion, payable at her mother's death, to be sold or disposed of at her husband's pleasure.

With the distinction above taken agrees the very modern case of *Pickard v. Roberts*. (b) A testator gave personal estate to trustees in trust to pay the interest to his wife for life, and after her death to make equal division of the fund among his children who should attain the ages of twenty-one years. He at his death left three children and his wife surviving him. The widow made a gift of her life interest to A, the husband of B, one of the children, and they three petitioned that the *reversionary* interest of B, who had attained twenty-one, *should be paid to her husband* A, B and the widow also consenting. But the Vice-Chancellor refused to make the order.

It is observable that in the last case the consent was offered to *pass* the wife's *reversionary* interest *to her husband*, in the absence of any power enabling her to dispose of such an interest, and whilst under the disability of coverture, without any valuable consideration, and, as it seems, upon the supposed analogy between her examination and consent in equity and a fine at law, an analogy which his Honour observed was always disclaimed in a Court of Equity.

The case which followed *Hewitt v. Crowcher*, before referred to, was *Woollands v. Crowcher*. (c) There the wife was intitled, amongst other property, to interest upon a share of 1225*l.* stock for her life, expectant upon the death of A. The husband and wife agreed to sell this *reversionary* interest for 180*l.*, but the purchaser required the wife's consent to be expressed in Court to the transaction; in order to obtain which the husband and wife filed a bill for a performance of the contract. But Sir William Grant would only take the wife's consent *de bene esse*, so as not to preclude the question as to her title by survivorship, if it should arise in that event happening. Upon that occasion his Honour said, that the effect of an assignment upon *reversionary* property had been doubted, and referred to the argument of Mr. Maddocks, in *Saddington v. Kinsman* (d), as to the Court not anticipating future property; but he admitted that other cases had said that the Court would do so; and

(a) 2 Vern. 762.

(b) 3 Mad. 384.

(c) 12 Ves. Jun. 174.

(d) 1 Bro. C. C. 44.

that it had so done in *Hewitt v. Crowcher*, and *Greg v. Crowcher*, before Lord Alvanley, and mentioned in the argument.

It will occur to the reader, that in the last case the wife's interest was such as her husband might have released (a); for it was an interest which might have fallen in during the marriage, viz. by A's death. It seems, therefore, singular that when the husband, instead of exercising his legal power, assigns the property for *value*, a Court of Equity should interpose obstacles in not permitting the wife to confirm the transaction by examination and absolute consent. Indeed the present disposition of the Court is not to take the absolute consent of the wife to the passing of her *reversionary* interest to a purchaser from her husband, but *de bene esse* only; and for the reason assigned by Sir William Grant in the above case of *Woollands v. Crowcher*, viz. because of the doubt now entertained as to the validity of the husband's assignment for *value* of his wife's *reversionary* property against her title by survivorship; and therefore not to prejudice her right if she were the survivor, and the Court should decide the question in her favour.

It is presumed, however, for the reasons before mentioned, that there is no solid distinction between reversionary interests of the wife and her other choses in action, in regard to the power of the husband to dispose of them in equity so as to intercept her title by survivorship, when they are *bonâ fide* assigned for value, and are such as may possibly accrue during the marriage, and are not settled before it as a provision for the wife in the event of her surviving him.

To pursue the analogy between law and equity. It appears before (b), and it will be shown afterwards, under the consideration of the effects of marriage upon the prior acts and agreements of husband and wife, that he at law can neither dispose of nor release such part of her personal property as cannot possibly accrue during the coverture. In conformity with this rule, it is determined in equity that where a woman stipulates, in the event of *surviving her husband*, that her property shall become her own, reserving no power of disposition over it during the marriage; neither her husband can dispose of it by sale or otherwise, nor can she do so during his life, either by deed, will, *consent*, or charge. And the principle is the same when personal property is so given or left to her.

In the two cases of *Richards v. Chambers*, and *Seaman v. Duill* (c),

(a) *Ante*, p. 238. [p. 449 of this vol.]; (b) Page 241 [p. 451 of this vol.]
and 1 Salk. 115. (c) 10 Ves. Jun. 580.

by the first of which property was settled in trust for the separate use of the wife for life, and if she survived her husband, then to be absolutely hers; but if she died before him, then as she by deed or will should appoint, and in default of appointment to her executors and administrators; and by the second of which cases, the property was settled to the husband for life, and if he survived to him absolutely, but if she survived, then to her absolutely: the question was, whether the contingent interests which the wife, whilst *sui juris*, had secured to herself in the event of *surviving her husband*, could by her *consent*, through the interposition of the Court, be given up by her to her husband while she was in a state of coverture? And Sir William Grant, then Master of the Rolls, determined in the negative; and said, that the interests were of such a nature, that if they had been created by another person the husband would have had no power over them, for he could not affect her interest which *could not* take effect in possession during his life.

The same point again occurred before that judge in *Lee v. Muggeridge* (a), with the additional circumstance, that the wife entered into a bond to pay a considerable sum of money by her heirs, &c., within six months after her death. After that event happened, the bond creditor filed a bill to subject her separate estate to the payment of the debt; but the Court held, that as the wife during the marriage could not, for the reasons before mentioned, dispose of her contingent interest by *direct* appointment, *à fortiori*, she could not do so by her bond. It appeared that she, after the decease of her husband, in answer to a letter requiring payment of arrears of interest, stated, that she was unable to discharge the bond, but that it would be settled by her executors. As to this, his Honour observed, that if she had done any thing that set up the bond, or if there was a new contract, her assets would be liable; but that previously the plaintiff must establish his right at law.

The principle upon which the last two cases were decided, will support the determination of Eyre, C. B., in *Fraser v. Baillie*. (b) In that case the husband vested money in trustees to pay the interest to himself for life, and *upon his death*, in trust, as to part of the capital, to pay the *interest* to his wife for life; and after the survivor's

(a) 1 Ves. & Bea. 118: see also
O'Keate v. Calthorpe, stated 8 Ves. Jun.
177: Nevison v. Longden, in the Court
of Exchequer, in June, 1800.

(b) 1 Brown, C. C. 518.

death, to divide that part among children, &c., subject to the wife's appointment; and in default of appointment, among them equally, and if no children, then for the husband. The husband and wife, by deed of appointment of part of the money in favour of one of their sons, stated, that they meant to part with the interest of it during their lives. The son, by his bill, prayed a transfer, and that the wife might be examined in court, to *consent* to the passing of her *interest for life*; but the Chief Baron refused to interfere.

Whatever might be his Lordship's reasons for thus withholding his interference, it is conceived that he decided correctly; for in this case the wife's life interest was a remainder or reversionary interest, which could not possibly fall into possession during the marriage, and was intended as a provision for her in the event of her surviving her husband; so that the Court could not, with any consistency of principle, authorise the wife during the marriage (although she consented) to part with such provision: this case, therefore, is governed by the same reasoning which produced the decrees in the two cases last stated.

The power of appointment given to the wife in the above cases of *Richards v. Chambers*, and *Lee v. Muggeridge*, merely applies to the disposition of the fund upon the contingency of her dying *before* her husband; it cannot therefore affect the interest which she has in the same property in the event of her *surviving* him: so that if she had executed her power, it could only have been effectual upon the contingency of her death during her husband's life; and if, on the contrary, she were the survivor, then she would be intitled to the whole fund, notwithstanding the appointment. Hence it appears, that although a wife in such a case appoint under the power, the Court cannot act upon it, through the medium of her *consent* to give up immediately the fund; which would have the effect of defeating her other contingent interest, because the power does not extend to such latter interest; and since she does not take it to her separate use, and is unable to deal with it as a *feme sole*, and as it is given or reserved to her as a provision upon her *surviving* her husband, and cannot be reduced into possession during the marriage, and therefore not at law disposable by the husband, the Court of Chancery will not, and it in fact has no jurisdiction to anticipate the application of the fund, upon the *consent* of the wife for the purpose. The cases last referred to prove this.

There are cases, however, prior to those, which are at variance with them, but which upon principle appear to be of no authority.

The leading opposition case is *M'Carmick v. Buller* (a): there, upon the marriage, 4000*l.* (the wife's fortune, with 5000*l.* to be secured upon the husband's real estate) were settled upon *trust* to pay the interest of the whole to the husband for life, with remainder to his wife for life, and after the death of the survivor to pay the principal as such *survivor* should appoint. The wife agreed to give up her interest to her husband; and they by deed poll *appointed* the funds immediately and absolutely to the husband. A bill against the trustees and wife was filed by the husband to carry the deed into effect; and the wife, by her answer, submitted to the prayer of the bill. After she had been examined in Court, it was decreed accordingly.

This case appears to be in contradiction to the principles before stated, and to the authorities above set forth and referred to. It cannot escape observation, that in this instance the wife stipulated for a provision for herself for life, in the event of surviving her husband, with a power also in the same event of disposing of the capital; which was in effect reserving to herself her own property if she survived him. She in fact took the best method to place her fortune out of her own reach during the marriage, with a view of preserving it for herself both at law and in equity, if she happened to be the survivor. It was surely, then, a great stretch of power in the Court of Chancery to leap over all these bars and fences, and by a single breath of the wife, under the influence and disability of coverture, to order the funds to be paid to the husband, in opposition also to his own express stipulation upon the marriage. The authority of this case has been questioned, as it might be expected, by modern judges (b); yet it seems to have had effect in producing similar decrees in some subsequent cases (c): but they must fall with their principal, and all of them appear to have been overruled by the contrary decisions before stated and referred to.

The case of *Frederick v. Hartwell* (d), decided by Lord Kenyon previously to *M'Carmick v. Buller*, differs from it in these important

(a) 1 Cox, Rep. 357; 8 Ves. Jun. 174.

(b) See the cases of *Nevison v. Longden*, in the Exchequer, in the year 1800: *Sperling v. Rochfort*, 8 Ves. 174: *Richards v. Chambers*, 10 Ves. 583—585.

(c) *Ellis v. Atkinson*, 8 Bro. C. C. 565: and *Guise v. Small*, 1 Anstr. 277.

(d) 1 Cox, Rep. 193.

particulars; that the property was not the subject of settlement upon the marriage, and the power to appoint was not postponed till after the marriage must have determined, but it might have been executed by *immediate* disposition of the fund, at any time during the coverture. The subject was a bequest by a stranger to the wife's separate use for life, and after her death, in trust as to the capital, as the wife should by deed or will appoint, and in default of appointment, for her absolutely; she, therefore, might defeat her ultimate interest by exercising her power of appointment. She did so, by appointing by deed the fund to her husband. They filed a bill for a transfer to him, and upon her examination and consent (a) in Court, it was ordered accordingly.

In this case it appears that the whole property was under the wife's dominion during the marriage. It did not depend, or was not intended to depend, upon the contingency of her being the *survivor*, as in *M'Carmick v. Buller*; but the power was so given as to authorise her, by executing it, to make an immediate disposition of the property, and even in favour of her husband, which she did accordingly. The Court, therefore, acting upon the appointment, and her consent, necessarily ordered the transfer.

Upon the same principle, the case of *Newman v. Cartony* may be reconciled, if the wife made an appointment; but which does not appear in the short note of the report. (b) So that when the wife takes an estate for life, with a power of immediate disposition of the property, and in default of appointment, to herself absolutely, it is presumed, that if she execute the power in favour of her husband, and consent to waive her right to a settlement, the Court will order an immediate transfer; but not without her having executed the power; otherwise the Court, by her mere consent, would be authorising her to pass an interest in her property which could not possibly fall into possession during the marriage, viz. her interest in default of appointment, and to do which the Court has no jurisdiction, as before appears.

But in all cases where the interest of the wife is such, that the Court will accept her consent to the passing of it, the property must be first ascertained, and the amount clearly known.

(a) The examination is unnecessary in cases of this description, the property passing by the appointment: *Sturgis v. Corp*, 13 Ves. 190.

(b) 3 Bro. C. C. 346—*notis*.

Thus, in *Edmonds v. Townshend* (a), in answer to a proposal that the wife's consent might be taken for the whole amount of the fund, without deduction, which would cover any less sum to which by abatements it might be reduced, the Court of Exchequer said, "that would be in effect taking her consent now to a sum to be ascertained at a future time, and be thereby depriving her of the power of changing her mind in the interim, which ought not to be done."

And in *Sperling v. Rochfort* (b), Lord Eldon said, it was *settled*, that whilst the property was unascertained, the wife's consent was not to be asked by the Court; and that whilst the Court could not state the amount of the property, it would not address to her any question, or speculate upon what might be her inclination. Upon this want of certainty in the amount of the funds, his Lordship pronounced his decree in that case.

No. V.

On Dower and Curtesy of Estates subject to Conditional Limitations. *By Mr. Roper. (c)*

IF the wife's seisin be defeasible by a condition annexed to the grant, and the condition be broken, and the donor enters, the husband's right to curtesy will be defeated; because the donor resumes his *original* and *former* estate; by which resumption the seisin of the wife is the same as if it had never existed; it being, by the donor's re-entry, defeated *ab origine*, with all the rights, charges, and incumbrances attaching to it before the condition was broken.

Thus, if an estate were given to a married woman in fee, upon condition that in case she did not pay to B 1000*l.* within five years, the donor might enter; if she do not pay the money, and entry is made, the donor becomes seised of his estate, as if such grant had never been made, and the wife's possession being thus defeated as if it had never commenced, there is no seisin upon which the husband can found a claim to curtesy.

(a) 1 Anstr. 93.

(b) 8 Ves. 180: *Jernegan v. Baxter*,
6 Madd. 32, S. P.

(c) *Vide supra*, vol. I. pp. 135. 349.

These remarks formed part of chap. I.
of Mr. Roper's treatise.

But it is not so of a *limitation* ; that has no retrospective operation or effect, it merely shifts the estate from one person to another, leaving the prior seisin undisturbed ; and whenever an estate is given over to a stranger, whether expressed by the word "condition" or not, the disposition over, upon non-compliance with the terms of the gift by the first donee, is a limitation ; for since the donor or his representatives only can take advantage of a condition, it would be in their power to disappoint the disposition over, by refusing to enter for a breach, if it were not considered a limitation, according to which, when the estate of the first donee determines, the one next limited commences, and the person intitled may enter upon the lands the instant that the failure happens. (a)

This introduces the consideration of a distinction (b), which has been alluded to as prevailing on the subject of curtesy, viz. that where, in its creation, the wife's estate of inheritance is not made determinable sooner than by its natural expiration, i. e. upon a failure of issue or heirs, the husband will be intitled to curtesy, although such estate expires upon the wife's death without leaving issue ; but that where the fee is originally devised or limited in words importing a fee simple or fee tail, absolute or unconditional, but by *subsequent* words it is made determinable upon a particular event independently of its natural expiration, if, in that case, the event happen, the husband's curtesy will cease with the estate to which it is annexed ; so that if a grant were made to the wife in fee simple or in fee tail of lands, whilst, or so long as A had heirs of his body, or until B attained twenty-one, and then to B in fee ; if A died without issue, or if B attained twenty-one ; then since the wife's estate became determined by express limitation, the husband's curtesy would not, according to such distinction, be continued, as it would have been if the estate had been given to the wife and to her heirs, or to the heirs of her body without the annexation of either of the defeating or determining clauses, and the wife's interest had naturally ceased by her death, without leaving issue.

The above distinction, in regard to the two limitations, is subtle, and may be considered unsatisfactory. In instances of conditions, the reasons for denying the husband's curtesy are clear, and have been before stated ; but why the husband should not be intitled to curtesy, equally upon a limitation to his wife in tail, determinable upon the

(a) 2 Black. Com. 155. refers to chap. 9. sec. 2. of his treatise.
 (b) On this question, Mr. Roper

event of A attaining twenty-one, and then to A in fee, as he would be if there had been no such determining event tacked to the wife's estate, and she died without leaving issue before him, is not so clear, upon reference to the principles of the decisions in other cases.

It is admitted that *both* limitations have defeating clauses attached to them; the one the contingency of A attaining twenty-one, the other an implied condition in favour of the donor and his heirs, upon non-alienation and failure of the issue of the donee; whence it might be urged, with some plausibility, that as the latter of the two limitations is strictly *conditional*, the entry of the donor, upon failure of issue, would, as in other cases of conditions, defeat the curtesy of the husband; yet we have seen that in this instance the husband's right to curtesy has been settled and adjudged; but with respect to the former of the two limitations, since it is *not* conditional in the legal sense of the word, but a *limitation*, which does not disturb the prior seisin of the wife, or the *initiate* title of the husband to curtesy, it may be asked, why should not the law in this instance, as in the other cases before mentioned, continue that seisin for the *completion* of the husband's title, as tenant by the curtesy? I know of no case containing an express decision to the contrary; and the inferential reasoning is not correct, that because the incidents or consequences flowing from the two limitations differ in some respects, they must, therefore, differ in all. These two limitations do indeed agree in one particular; they do not disturb the seisin which the wife had previous to the happening of the events which determined her estate; so that all the authorities applicable to show the continuance by the law of the wife's estate for the curtesy of the husband after her estate determined by a failure of issue, apply also to the other limitation above described. The cases which have been supposed to authorise the distinction between the different effects of the two limitations in regard to curtesy do not appear to have been determined upon that point. It is true that in *Boothby v. Vernon* (a), before mentioned, the Court said, that wherever the wife's estate was to determine be express limitation or condition *upon her death*, curtesy did not attach, but that *dictum* must be considered in relation to the facts of the case, and then it would mean no more than this, that where the wife had a life estate only by express limitation, with the reversion in fee, subject to a contingent remainder in tail to her issue male, if she left any; the reversion being executed in her *sub modo* only (*i. e.*

(a) 9 Mod. 147.

to separate from the particular estate as if they had never been united, upon the contingency happening); if the wife leave a son at her death (as she did in *Boothby v. Vernon*), she was to be considered as having been seised of an estate for life only during the marriage, which estate having determined by express limitation at her death, her husband could not make a title to curtesy. (a) And with respect to the case in *Leonard* (b), A covenanted to stand seised to the use of B, her eldest daughter in tail, upon condition that B should pay to her sister C, within a year after A's death, or within a year after C should attain the age of eighteen, the sum of 300*l.*; and if B failed to make such payment as aforesaid, then to the use of C in tail. B, after A's death, married, had issue, and died without leaving issue before the period arrived for payment of the 300*l.* Question, whether her husband should have curtesy? And the Court decided in his favour, upon the ground, that as the estate tail in B determined by her death without issue, her husband, as settled in such cases, was intitled to curtesy. Such alone was the point expressly determined. And in *Flavill v. Ventrice* (c), a case of dower, no decision appears to have been made, the opinions of the four judges having been equally divided. Consider, then, this question upon reason and principle. It is settled that in every case, where a man takes a wife seised of such an estate in lands, as that the issue which she has by him might by *possibility* inherit them as heir to her, he shall, after her death, hold the lands for his life as tenant by the curtesy: if, therefore, at any time during the marriage, the wife is seised of the inheritance, and have heritable issue, it seems to be a necessary consequence, that whether her estate determine by the death of such issue, or by any event *subsequent* to such seisin, attached to such estate, where it is not avoided *ab initio*, the inchoate right to curtesy shall not be defeated by either of those events taking place. Besides, the husband's title to curtesy is not merely derived out of, or dependant upon his wife's estate, but it is created by law, it is a privilege and benefit of law annexed to the gift; and the law, as I conceive, says, that as the estate *remains* (d), and the husband's right to curtesy once attached to it, such right shall be a charge upon the estate, into whose possession soever it may afterwards come during the marriage. In this respect, curtesy and dower are governed by the same principle. The very case in ques-

(a) Mr. Roper refers to vol. i. p. 9, and chap. 9, sect. 2, pl. 4, of his treatise.

(c) Roll. Abr. 676; Goldsb. 81.

(b) *Sammes v. Payne*, 1 Leon. 167.

(d) See pp. 14, 15. [vol. i. p. 132 of this treatise.]

tion was put by Anderson, J., in the case of *Sammes v. Paynes* before referred to, viz. that if a feoffment were made to the use of J. S. and his heirs, *until* J. D. had done such a thing, and then to the use of J. D. and his heirs, and the thing was done, and then J. S. died, the wife of J. S. should be endowed. This appears to have been admitted in *Doe v. Hutton* (a); and the above observations seem to be supported by the authority reported in a note to the last case referred to: — Devise to trustees and their heirs, to receive the rents and profits of an estate, and apply them for the maintenance of Mary Barnes, until she arrived at the age of twenty-one, or until she married, and upon her arrival at that age, or *marrying*, to the use of Mary Barnes in fee; but *in case she died before the age of twenty-one, and without leaving issue*, remainder over. Mary married, and had a child, which died, and then she died under the age of twenty-one. Question, whether Mary's husband was intitled to be tenant by the curtesy? And Lord Mansfield and the other judges decided in favour of the husband's title: his lordship observing that tenancy by the curtesy existed before the statute *De Donis*; that estates at that time were of two sorts, conditional or absolute, and that curtesy applied to *both*; that at common law, the only modification of estates was by *condition*: that all the cases which had been cited went upon the distinction of their being conditions, and not limitations, and that in the present case the wife, during her life, continued seised of a fee simple, to which her issue might by possibility inherit. (b)

(a) 3 Bos. & Pull. Rep. C. P. 652. Trin. Term, 25 Geo. 3; 3 Bos. & Pull.

(b) *Buckworth v. Thirkell*, K. B. 652, n.; 1 Coll. Jurd. 332.

No. VI.

On Dower and Curtesy of Estates subject to Conditional Limitations.
By Mr. Jacob. (a)

THE question whether the right to curtesy or dower continues after the estate of the wife in the one case, or of the husband in the other, has determined by limitation, or by an executory devise, is one much embarrassed by conflicting authorities. It is ably discussed by Mr. Park. (b)

It has been seen, that where the husband or wife is seised in fee tail, the right of dower or curtesy continues notwithstanding the determination of the estate or failure of issue. The principle on which the estate is thus prolonged beyond its natural expiration, is, as Mr. Butler remarks, at this period, rather to be guessed at than demonstrated. The reason assigned in Paine's case, is, that dower and curtesy being the legal incidents of an estate in fee, are considered to be tacitly implied in the grant of that estate. (c)

But in cases where the estate determines by entry for a condition broken, or by reason of a defective title in the grantor, it has been seen that the right to dower or curtesy is also defeated.

Where the estate by the original grant or devise creating it, is to continue till some specified event shall happen, it seems that dower or curtesy will not continue after that event has happened. Thus, where land or rent is granted to one and his heirs till the building of St. Paul's shall be finished, if the event happens, dower shall cease. (d) The case of a rent reserved on an estate tail, which determines by failure of issue, is an instance of the same kind. (e) So if a rent be granted with condition to cease during the minority of the grantee's heir, the wife of the grantee will be endowed of the rent with a *cesset executio*, during the minority of the heir. (f)

It appears, therefore, that in all cases of estates governed by the

(a) *Vide supra*, vol. I. pp. 135. 349. These remarks formed No. 2 of the addenda to Mr. Jacob's edition of Roper.

(b) *Treatise on Dower*, p. 168; see also Butl. Co. Litt. 241, a, note 4.

(c) 8 Co. 68. 71.

(d) Jenk. p. 5, Cent. 1, Case 6.

(e) *Ibid.*: and Co. Litt. 30, a.

(f) Jenk. p. 4, F. N. B. 149, note: Perk. 327: 10 Mod. 367: see also Park on Dower, p. 162: Preston on Abstracts, vol. iii. p. 373: *contra*, Butl. Co. Litt. 241, a, note 4.

rules of the common law, the right to dower or curtesy was only co-extensive with the duration of the estate, with the exception of the case of an estate tail determining by failure of issue. But upon the introduction of conditional limitations by way of use and executory devises, it became a question whether dower or curtesy should cease when the estate was determined by either of these modes. Upon principle, it would seem that the decision of this question ought to be guided by analogy to the general rule of the common law, and not by analogy to the excepted case of an estate tail. If the principle of that exception be that which is stated by Lord Coke, it can have no application to an estate determined by conditional limitation. If dower and curtesy be tacitly implied in the gift of an estate tail, they are enjoyed after failure of issue as part of that which is granted. But the conditional limitation destroying the estate, defeats the whole of that which is expressly granted. It would be singular, if that which is included in the grant by implication only, could be preserved. (a) Mr. Preston observes, that "the cases of dower of estates determined by executory devise and springing use, owe their existence to the circumstance, that those estates are not governed by common-law principles: and when the limitation over was allowed to be valid against the former donee, it was on the terms that the limitation over should not impeach the title of dower of the wife of that donee." (b) And if it be the rule, that dower and curtesy are exempted from the operation of limitations of this description, it probably originated in some indulgence shown to these interests, at the period when the validity of such limitations was established. But it will be seen that the supposed rule rests on very doubtful grounds.

The case of *Flavill v. Ventrice* (c) was not decided, the judges being divided upon the question, whether dower was defeated by a shifting use. The case of *Sammes v. Payne* (d) decided only that curtesy continued after the expiration of an estate tail by failure of issue, and though some conflicting dicta are to be found in the reports of that case, the comparison of them made by Mr. Park shows that no certain result can be deduced from them. In *Buckworth v. Thirkell* (e), the question was decided in favour of the continuance of curtesy.

(a) See Park on Dower, 185.

(b) Abstracts, vol. iii. p. 373.

(c) 9 Vin. Ab. 217.

(d) 1 Leon. 167; 8 Co. 67; Goldsb.

81; 1 And. 184.

(e) 3 Bos. & Pull. 652, note: 1 Coll. Jur. 332.

That decision has generally been much questioned. (a) It is, however, said to have been followed by a case of *Goodenough v. Goodenough*, mentioned by Mr. Preston. This case has been shortly noticed by Dickens (b): the following statement of it is extracted from the Register's Book. (c)

R. Serle devised certain estates to his nephew William Goodenough and his heirs for ever, subject to the condition and limitation after mentioned; viz., that in case his said nephew should happen to die unmarried, and without issue of his body lawfully begotten, his will was, that the devise and devises thereinbefore made should, in any or either of those cases, cease and be absolutely void; and in that case he gave the estates to his nephew Richard Jocelyn Goodenough.

The testator died, leaving R. J. Goodenough his heir at law. William Goodenough afterwards married the plaintiff, having first, by articles previous to the marriage, agreed to settle lands of sufficient value to secure a jointure of 200*l.* per annum to her for life, with remainder to the issue of the marriage.

By his will he gave his personal estate to the plaintiff, and appointed her executrix, and recited that his brother Richard would have the estates left him after his (William's) death by R. Serle, and as he left them to his brother without any litigation, which there was the greatest room for, he hoped he would have the generosity to pay his wife her dower regularly, and without dispute. He died without issue, leaving his brother his heir at law.

The bill prayed that the plaintiff's jointure might be made good out of the lands devised by Serle, or that she might be endowed out of those lands. It submitted, that the estate of William in those lands became absolute on his marriage; or that, if the devise over was intended to take effect on his dying without issue, then that it was void as being too remote, or that it reduced the estate of William to an estate tail; and, therefore, that the plaintiff was intitled to dower.

The defendant R. J. Goodenough, by his answer, insisted that there was no agreement on the marriage of the plaintiff for a settlement of the lands in question; and submitted that she was bound, out of the personal estate of her husband, to purchase lands of the value of 200*l.* per annum, upon the trusts of the marriage articles, under which he would become intitled on her death. He submitted, that

(a) Co. Litt. 241, *a*, note 4: 3 Bos. & Pull. 653.

(b) Vol. ii. 795.

(c) 31 Jan. 1772: Reg. Lib. A. 1771, fo. 557. J

the executory devise in the will of R. Serle was intended to take effect on the death of William, unmarried, or without issue; and that the testator having coupled those events in the same sentence, the latter must be understood to refer to the death of William, and therefore was not too remote.

The decree declared, that according to the true construction of the will of William Goodenough, the plaintiff was intitled to have dower only out of the estates of which he died seised, and referred it to the Master to take an account of the rents and profits, and to set apart and allot sufficient of the said estates, as and for the dower of the plaintiff therein.

From the language of the decree, referring the plaintiff's right to her husband's will, it is probable that the Court adopted the view submitted by the bill, holding the husband's estate to be absolute; and if so, the decision does not affect the present question.

A case closely corresponding with *Buckworth v. Thirkell* has lately occurred, and has received a similar decision in the Court of Common Pleas. (a) The father of the husband devised to him and his heirs for ever, all his houses, &c., subject to the payment of an annuity; and if the said W. F. (the husband) should have no children, child or issue, the said estate was on the decease of the said W. F. to become the property of the heir at law, subject to such legacies as he the said W. F. might leave by will to any of the younger branches of the family. It was decided, that under this devise, W. F. took an estate in fee, with an executory devise over, in the event (which happened) of his dying without issue, to the person who should then be the testator's heir at law. (b) It then became a question, whether his widow was intitled to be endowed; and a bill having been filed by her for that purpose, a case was stated for the opinion of the Judges of the Common Pleas, who certified in her favour. The judgment of the Lord Chief Justice proceeded chiefly upon the authority of *Buckworth v. Thirkell*, and the supposed authority of *Goodenough v. Goodenough*; and upon the consideration that, from the nature of the limitations, the case came within the definition of *Littleton* (c), according to which the right to dower exists where the husband's estate is such, that the issue the wife may have by him may inherit. (d)

(a) *Moody v. King*, 2 Bing. 447.

(b) *Doe d. King v. Frost*, 3 Barn. & Ald. 516.

(c) Sec. 53.

(d) It is understood that this case is still under litigation, and that it will probably come before the Courts again.

These are the authorities in favour of the opinion, that dower and curtesy may continue after the determination of the estate by limitation. On the other hand, it was said in *Boothby v. Vernon* (a), that "wherever the estate is to be determined by express limitation or condition upon the death of the wife, there the husband shall not have curtesy;" and according to one of the reports of *Sammes v. Payne*, the reason given for the husband's having curtesy of an expired estate tail was, that it was "spent and determined by the dying without issue, and doth not cease, or is cut off by any limitation." (b)

The point arose in *Sumner v. Partridge*. (c) Land was devised to A and her heirs, and if she died before her husband, he to have 20*l.* a year for life, and the remainder to go to her children. The wife died before the husband. The Master of the Rolls treated it as clear, that the husband was not intitled to curtesy; and for this reason, that the mother's estate of inheritance ceased the moment she died, and the children took not by descent, but by virtue of the remainder over: neither a tenant in dower or curtesy could intitle themselves to an estate in dower or curtesy, where the children who were left could not possibly take an inheritance, for the moment of time when the husband takes as tenant by the curtesy the inheritance must *descend* upon the children.

The decision in the case of *Ray v. Pung* (d) materially influences the point under consideration. An estate liable to be determined by a springing or shifting use, is not in substance distinguishable from an estate liable to be determined by the exercise of a power of appointment: the effect is the same, whether the new use is to arise on the execution of the power, or on any other uncertain event taking place. In either case it arises from the original instrument, taking effect, in point of time, from the period when the event happens: and since it has been settled that the right to dower is defeated by the appointment, it seems to follow that the same rule must prevail with respect to estates determined by shifting or springing use; and the case of an executory devise must be governed by similar considerations. In the argument of *Ray v. Pung*, and in the Vice-Chancellor's judgment, the questions were looked upon as nearly the same in substance; and *Buckworth v. Thirkell* was referred to as one of the main authorities in favour of the widow's right. It does not appear that this analogy was adverted to in the late case of *Moody v. King*.

(a) 9 Mod. 150.

(c) 2 Atk. 47.

(b) 1 Leon. 168.

(d) 5 Barn. & Ald. 561; 3 Madd. 310.

With respect to the case of *Buckworth v. Thirkell*, it may be doubted whether the Court intended to decide generally that curtesy should exist, notwithstanding the determination of the estate by executory devise, or whether it turned upon the particular nature of the limitation. The wife was seised in fee, subject to an executory devise over, in the event, which happened, of her dying under age, and without leaving issue. Hence, if she had left children they would have been intitled by descent; and the judgment of Lord Mansfield proceeded chiefly (if not entirely) upon the ground that the case for this reason came within the definition of curtesy, that the wife had an estate of inheritance, which any issue she might have had by the husband would have inherited, and that that estate continued during her life. The decision of the Court of Common Pleas, in *Moody v. King*, seems to have been founded on similar reasons; and the case of *Goodenough v. Goodenough* (if it involved this question) is open to the same distinction. These cases, therefore, (supposing their authority to be admitted) cannot be considered as deciding any thing, except where the death of the husband or wife, without leaving issue, is the event upon which the estate is determinable. Still less do they apply to cases where the limitation depends upon an event which happens during the coverture. To sustain the argument in favour of dower and curtesy in such cases, it would be necessary to contend, that after the estate of the husband or wife had ceased, and the party intitled under the limitation over had entered, the former estate should partially revive upon the determination of the coverture. The doubt in the case of *Flavill v. Ventrice* did not go to this extent, the event not having happened till after the husband's death; and though, according to one of the reports of *Sammes v. Payne* (a), this point was put by one of the judges, yet the absence of the passage from the other reports of the case, and the other discrepancies between them which Mr. Park has pointed out, show that very little reliance can be placed on the authenticity of this dictum.

It may be concluded, that there is no authority for the continuance of dower or curtesy after the determination of the estate by conditional limitation or executory devise, except where it determines by the death of the husband or wife without leaving issue, and that it is still extremely questionable whether that exception can be supported.

(a) 1 Leon. 166.

No. VII.

*On the Mode of Election by a Feme Covert in a Suit. By
Mr. Jacob. (a)*

IN the cases in which married women have been decreed to elect, there has been much variety of practice as to the mode in which their election is to be declared. The cases are collected by Mr. Swanston, in one of the able and learned notes on the subject of election, in the first volume of his Reports, p. 415. Sometimes the election of the married woman has been made upon a personal examination in court, or before commissioners appointed for the purpose. *Parsons v. Dunn*, 2 Ves. 61: *Ward v. Baugh*, 4 Ves. 623. In one case, she was ordered to signify her election by signing the registrar's book, by her clerk in court, within a limited time. *Pulteney v. Darlington*, 7 Bro. P. C. ed. Toml. 546, 547; 1 Swan. 416; and in another to make her election before the Master within six months. *Vane v. Lord Dungannon*, 2 Sch. & Lef. 133.

In other cases it has been referred to the Master to inquire what election would be most beneficial for the married woman. *Wilson v. Townshend*, 2 Ves. Jun. 693; and see 9 Ves. 350. This course was adopted in *Pulteney v. Darlington*, when she had failed to comply with the order for electing through the medium of her clerk in court.

It has been said (2 Ves. Sen. 61: 2 Ves. Jun. 560) that a reference to the Master is the proper course, in case of the husband and wife disagreeing as to the election: a supposition inconsistent with the other cases, which appear to treat the election as the sole act of the wife.

In *Wilson v. Townshend*, *ub. sup.*, the value of the funds appearing on the pleadings, the Court being itself able to judge what would be most for her benefit, determined her election without a reference. That case is singular in some of its circumstances:—The Court, in considering which election would be most beneficial to the wife, appears to have been influenced only by the comparative value of the

(a) *Vide supra*, vol. I. p. 158., and vol. ii. vol. i. p. 28. of Mr. Jacob's edition p. 58. These remarks formed a note to of Roper.

funds, without regard to the circumstance that one of them was given to her separate use, and dismissed her bill without allowing her an option to accept that provision.

In *Wright v. Rutter*, 2 Ves. Jun. 673, 4 Ves. 535; *Brodie v. Barry*, 2 Ves. & B. 127, Reg. Lib. A. 1812, fol. 1437; and *Bradish v. Bradish*, 2 Ball & B. 491, it does not appear in what particular mode the election was to be signified.

The election of a feme covert may also in some cases be determined by other acts besides an express election made in a suit for that purpose. In *Stratford v. Powell*, 1 Ball & B. 1. 24, a widow bound to elect under her husband's will, by settlement on a second marriage, reserved her property to her separate use; and it was held that acts done by her during her second coverture fixed her election. In *Ardesoife v. Bennet*, 2 Dick. 463, a married woman was intitled to an estate which was attempted to be devised away by a will, giving to her separate use a legacy of much greater value: she received the interest of the legacy, and was held to have thereby made an election, binding on her heir. [See also *Parke v. Downing*, 2 Jur. 28.]

In cases of real estates, if she joined her husband in selling part of one of them, it would seem that this must be held to be a conclusive election. The decree in *Brodie v. Barry*, *ub. sup.*, declared that the heiress of the testator's heritable estates in Scotland was bound to elect, if she had not already elected; and with a view to the latter point, directed an inquiry whether she and her husband had sold any and what parts of the heritable estates, or whether they had done any other acts in respect thereof. See also *Lewis v. King*, 2 Bro. C. C. 600.

Where neither of the funds is given to her separate use, it may be presumed, upon general principles, that acts *in pais*, done while under the disability of coverture, will not constitute an election. See *Oldham v. Hughes*, 2 Atk. 452; *Cunningham v. Moody*, 2 Ves. Sen. 170. Where one of the funds only is given to her separate use, *Ardesoife v. Bennet*, *ub. sup.*, is an authority in favour of her capacity to elect by acts done out of court; but that case turned partly on the value of the property. On this point see *Wilson v. Townshend*, *ub. sup.*

In case of the wife dying without having made a conclusive election, it has been intimated that it might be determined by a reference to inquire which would have been most for her advantage. 2 Ball & B. 25.

When the interests or inclinations of the husband and wife on the subject of election happen to be at variance, a question arises how far an election made by the wife, or by the Court, or the Master on her behalf, can affect the marital rights of the husband in the property relinquished. Some discussion on this question appears to have taken place in *Pulteney v. Darlington*: that case ended in a sort of compromise (see 2 Ves. Jun. 560), but the opinion of Lord Chief Justice De Grey, cited in the text, and the form of the decree, imply that the husband's interest is bound by the election made by the wife, or on her behalf. In *Parsons v. Dunn*, and *Bradish v. Bradish*, (cases relating to personal estate) the question appears to have been considered in the same way. In *Vane v. Lord Dungannon*, where the property taken under the will was real estate, the decree was framed upon this principle, which seems also to be favoured by the cases of *Ardesoife v. Bennet*, and *Wilson v. Townshend*. On the other hand, in *Brodie v. Barry*, where the wife was put to elect between a bequest to her separate use and heritable estates descended, it was taken to be clear that the husband's marital right in the latter could not be prejudiced by her election.

A distinction may, perhaps prevail on this point between those cases where the property proposed to be relinquished by the wife consists of a legacy or a trust fund of a personal nature, and those where it consists of real estate. In the former cases the husband has not an absolute right in the property; his interest in it is subject to the control of a court of equity, which has authority to apply a part of the fund, or even the whole, in such a manner as circumstances may render most beneficial to the wife and her children. But in the latter cases, the marital right, which the law confers on him, is not subject to any equitable qualifications. It being settled that election is not a legal doctrine (*Harford v. Dillon*, 2 Brod. & Bing. 12. See 1 Swan. 430, *n.*), and the wife alone having no power to convey or to waive the estate, her election to relinquish it cannot be carried into effect without his concurrence; and it does not appear upon what principle that election could authorise a court of equity to compel him to convey away the legal interest vested in him.

It may be remarked that the husband may disagree to or waive an estate acquired by his wife, Co. Litt. 3, *a*. Vin. Ab. Disagreement, pl. 6, 22. How far the exercise of this legal power is controllable in equity, is a question which does not appear to have arisen.

[In the late case of *Wall v. Wall*, V. C. E., 16 Law J. N. S. Chan. 305; 11 Jur. 403, the question was raised as to the effect of the wife's election where the fund proposed to be relinquished was a reversionary chose in action, but it was not decided.]

No. VIII.

Of the Wife's Remedy against her Husband's Discontinuance by Remitter. By Mr. Roper. (a)

AFTER considering the remedy given to the wife by the statute of Henry the Eighth against her husband's discontinuance of her estate, it is proper to notice the provision made by the common law to repair the injury whenever the opportunity offered. In order to understand this subject, it will be necessary—*first*, to consider the common-law remedy; and *secondly*, the alteration made in it by the statute of uses (*b*), and the act of the 32 of Henry the Eighth. (*c*)

1. The common-law remedy by remitter.

Remitters are twofold: the *first* is when a person, having a prior and perfect right to an estate recoverable by action only, has *cast* upon him and not gained by his own *act* a defeasible estate of *freehold* in the same premises. The *second* is where the party has the power of clothing his ancient right by *entry*. In the first case, since the party cannot bring an action against himself to establish his prior and better right, the law affords redress by remitting him to such right, *i. e.* in extending to him the same advantages as if there had been no obstacle to his recovery, and he had been in a situation to have commenced, and had prosecuted with effect, a real action to establish his prior right. (*d*) In order to effect this species of remitter, the second defeasible estate must be an *immediate* freehold and *cast* upon the party having the prior right recoverable by action only, because the

(a) *Vide supra*, vol. I. p. 168. This formed sec. 3. of chap. 2. of Mr. Roper's treatise.

(b) 27 Hen. 8. c. 10.

(c) Chap. 28.

(d) But the party on whom a defeasible estate of freehold is thus cast, if

sui juris, may, it seems, waive his former right of action, and elect to hold the new estate without being remitted. Bro. Remitter, pl. 39: 2 Roll. Rep. 34: 18 Vin. Ab. 454, pl. 2, 3, *contra*, Keilw. 20. — *Note by Mr. Jacob.*

action could not be brought against a person having less than an estate of freehold; and until the party were intitled to the possession no right of action could accrue. But this second estate must not have been acquired by the *act* of the person to be remitted, for against his own deed and agreement he would not have been allowed to recover his prior right in an action if he had been under circumstances enabling him to have brought one. (a) Hence, if the party could have no remedy by action for his first or old right, if the defeasible estate of freehold were in another person instead of being in himself, he cannot be remitted (b); as where he is barred of his first right by the fine or warranty of his ancestor. (c)

Suppose, then, tenant in tail to discontinue by feoffment the estate tail, and then to disseise or to turn out of possession the alienee, or to take back to himself an estate in tail, or for life with remainder to his first and other son and sons successively in tail, and to die seised leaving a son: in either of these cases the common law remits the son upon his father's death, but not before, because the son's right to the possession did not commence sooner (d); yet the father is not remitted, because it was his own act and folly to take back the defeasible estate, which circumstance is a bar to his recovering his former right by action. (e)

But there was an exception to this latter doctrine arising from the nature of the estate which the discontinuor had at the time of the discontinuance.

Thus, if husband and wife were tenants in special tail, with remainder to B, and the husband discontinued the estate, and afterwards took back to himself and wife an estate in special tail, the wife would by the common law, before the statute of uses and the act of 32 Hen. 8. c. 28, be remitted to her first estate tail, and immediately so, without regard to her husband's death; for she had a *present* right to the freehold, and not a future one, as in the instance of the issue before mentioned. (f) The consequence of which remitter necessarily was the remitter also of the husband; for although the taking back of the second defeasible estate was *his*, not her act (g),

(a) Co. Litt. 363 b.

(b) Co. Litt. 349 b.

(c) Moor, 115: see also Co. Litt. 347, 348. 358.

(d) Co. Litt. 358.

(e) Litt. sect. 659.

(f) Co. Litt. 351 b, 352 a.

(g) It is stated by Littleton to be an exception to this doctrine, if the second estate be acquired by disseising the discontinuor, and the husband and wife are of covin and consent that the dis-

yet since they, as has been before observed (*a*), took the new estate in *entirety* and not in severalty, the remitter of the one was necessarily also that of the other. (*b*)

Since remitters tended to the advancement of ancient rights, they were favoured and promoted by the common law. When the ancient and new rights met together in the wife, the remitter was instantaneous, and the husband's disagreement to it was ineffectual to prevent it; for the remitter preceded such disagreement, so that the wife's prior right having been restored, could not afterwards be devested by her husband's dissent. Neither was the wife, after her husband's death, permitted to waive her remitter, and claim the estate limited to her during the marriage. (*c*) But in regard to this privilege of election, it was only prevented when the first estate could not be waived by the wife, as when taken by her *before* marriage, in which case she could not, upon surviving her husband, disannul, by her election to take the second estate, the remitter which the law had worked during such marriage. If, however, both rights or estates were voidable by her, as when both accrued *during* the marriage, in such case she might have elected upon her husband's death, either to be remitted to her first title, or to renounce it, and take as a purchaser under her second title; but this power of election was subject to this restriction, that it could not be exercised if it tended to the injury of another person. These propositions will more clearly appear from the two following cases.

Lands were given to husband and wife, and their heirs, and the husband made a feoffment in fee, and then the feoffee regranted the

seisin should be made: in this case he says there shall be no remitter, because the wife is a disseisoress. Sect. 678. But Lord Coke observes upon this, that a feme covert cannot be a disseisoress either by her commandment or procurement precedent, or by her assent or agreement subsequent. As to the acts by which a feme covert may be said to become a disseisoress, several conflicting cases are collected in Vin. Ab. tit. Disseisin, D. E. F., which relate chiefly to the form in which the action was to be brought by the disseisee. It is laid down in one of these cases (F. pl. 5.), and it seems to be consistent with principle, that if the husband and wife

wrongfully enter, claiming in right of the latter, it shall be taken as the act of the husband only, and therefore that the wife is not a disseisoress. It is probable, therefore, that the exception alluded to above could only exist in the case of a disseisin by the sole act of the wife; and even in that case, the wife having now a right of entry under the statute on her husband's death, would, it seems, then be remitted.—*Note by Mr. Jacob.*

(*a*) *Ant*, p. 51. [vol. I. p. 25. of this treatise.]

(*b*) Litt. sect. 672: Hob. 255.

(*c*) Co. Litt. 356 *b*, 357 *a*.

estate to the husband and wife in tail, and the husband died; the wife might have *elected* between the two interests or estates given to her after the marriage. But if the lands had been given to the husband and wife in special tail, with remainder to A; and the husband made a feoffment in fee simple, and the feoffee granted the estate back again to them for life, with remainder to B in fee: although this would be a case of election in regard to the wife, as both estates or rights accrued during the marriage, yet as A would be prejudiced by her electing to take the second estate under the feoffment, the law as in general remits her to her former estate, without respect to her election. (a)

The *second* species of remitter is where a person has the power of clothing his ancient right by *entry*. Two things must concur in this remitter; a right of entry in respect of the old title, and, as it is presumed, an entry under the new (b), except when the latter is acquired by descent, and then no entry is necessary.

Remitter upon a right of entry has an advantage which does not belong to remitter upon a right of action. Thus, if a disseisee retake by his *own act* an estate in the land, and enter, he will be remitted (c); because the law in favour of right and for the remedy of wrong operates upon the entry, a common-law right, and effects a remitter; yet as the second estate was acquired by the *act* of the party, he may elect whether he will be remitted or take such second estate. (d) But if the second or wrongful estate be cast upon such person *by* the law, he will be remitted *volens volens*. Accordingly, if the father disseise his son, and dies seised, upon which the fee acquired by the disseisin descends to the son as heir, he is instantly remitted. (e)

[But if the party having a right of entry takes a new estate, by matter of record, he is estopped from claiming in his former right and

(a) Hob. 71, 255.

(b) Co. Litt. 363 b, 364 a: Gilb. Ten. 129: 1 Lev. 49: 2 Bulstr. 29: Cro. Car. 145. But according to some authorities, the remitter takes place when the right of possession is acquired under the new estate (except when acquired by the act of the party, or by way of use). Hob. 256: see *post*, and Preston on Abstracts, vol. ii. p. 380.—*Note by Mr. Jacob.*

(c) Co. Litt. 363 b.

(d) This agrees with what is said in Keilw. 41. But in the subsequent case of Wood v. Shirley, it was laid down according to the report in 2 Roll. Rep. 34, 35, that a party having a right of entry, who acquires a new estate either by act of law or by his own act, and enters, is remitted without the power of election. See also Litt. 695, 696: Gilb. Ten. 129.—*Note by Mr. Jacob.*

(e) Keilw. 41, pl. 7.

is not remitted. (a) If he takes a new estate by deed indented, he is not remitted on acquiring it (b); but it has been decided that on entering under the new title, he is remitted. (c)]

What has been said upon the common-law doctrine of remitter will be sufficient to give an idea of the principles upon which it is founded: the consideration of which was necessary to the understanding of what follows upon this subject. The doctrine is fully discussed by *Littleton*, in his chapter "Remitter" (d), and by *Lord Coke* in his commentary upon the text; which, for details, may be consulted by the reader.

I shall now proceed—

2dly—To the consideration of the alterations made in the common law of remitter by the statute of uses.

By this statute (e) it is enacted, that when any person shall be *seised* of lands, &c. to the use, confidence, or trust of any other person, &c., the *person*, &c. intitled to the *use* in fee simple, fee tail, for life or years, or otherwise, shall from thenceforth stand and be seised or possessed of the *land*, &c., of and in the like estates as they have in the use, trust, or confidence; and that the *estate* of the person so seised to uses shall be deemed to be in him or them that have the use, in such *quality, manner, form, and condition* as they had before in the use.

It appears that this statute expressly transfers the freehold and possession to the person to whom the use or trust of the lands is limited; but it qualifies the title, and the possession of the *cestuique use*, in declaring that the possession and interest so transferred shall be in, and taken by him in such quality, manner, and form as he had *before* in the *use*, which implies a negative, viz. that the possession and interest so taken shall operate to no other purpose, but must be founded entirely upon the *new* estate acquired under the conveyance. (f) Hence the effect of this enactment has been to exclude the doctrine of remitter in cases where a person's right under a good prior title has been *discontinued*, and a new defeasible estate has been limited to him in *use* by a subsequent conveyance (g); for if remitter were allowed, it would be a repeal of the statute, which in effect declares

(a) Co. Litt. 363 b: Gilb. Ten. 129.

(b) Ibid.

(c) *Beauchamp v. Dale*, Cro. Eliz. 20; Hob. 256. This is analogous to the effect of an entry under a new estate acquired by way of use, *post*, p. 74. [p. 481. *infra*.]—*Note by Mr. Jacob*.

(d) Co. Litt. 347 b.

(e) 27 Hen. 8, c. 10.

(f) See Gilb. *Uses*, by Sugden, 180, *note*.

(g) See p. 79. [p. 485. *infra*.]

that the *cestuique use* shall take no other estate or interest than what was given to him in the *use*; but by the remitter he would take a possession, interest, and title quite different from that limited to him *by the use*. Hobart, C. J., thus expresses himself upon this subject: "It is clear, that if an infant or woman covert, having right of land discontinue, wherein *entry* was not lawful, come to that land by way of a *use* raised out of that estate, the *first taker* of such estate shall not be remitted for the violence of the letter of the statute 27 Hen. 8 (a); and that the *first taker* in this case is to be understood of the *first taker* of *every several* estate, as well in *remainder* as in possession."

In the discussion of this subject we shall consider the different parts of Lord Hobart's declaration, as the most convenient method for imparting the observations which occur upon these questions.

His Lordship's observations do not apply to the case of a remitter upon a right of *entry*, but to a remitter upon a right of *action*, both of which have been before considered. But now, by the statute of 32 Henry the Eighth, mentioned in the last section, the husband's alienation of his wife's estate, as against herself and the persons claiming it after her death, is provided against by giving them a right of *entry* where a right of action only was the remedy at the common law. In these cases, therefore, this statute is a virtual repeal of the statute of uses, for it seems that in all cases where the estate discontinued by the husband is of the inheritance or freehold of his wife, of which she was seised before the marriage, whether the second defeasible estate of freehold be or be not limited to her by way of *use*, she will be remitted to her prior estate, upon her entry after her husband's death, or on their joint entry (b), which will also remit all the remainders depending upon it; for the common-law right of entry having been given in those instances by the act of the 32d of Henry the Eighth, all the incidents and effects belonging to the exercise of such a right by that law immediately attach to it, one of which is that of remitter. Accordingly, if the subsequent defeasible estate be taken to the husband and wife, and they enter, she will be *instantly* remitted (c); or if she take it in *remainder*, expectant upon her husband's death, she will be remitted upon entering when her right to the possession of the freehold commences.

(a) Vavasor's case, 2 Leon. 222.

(c) Litt. sect. 673 : Hob. 254.

(b) 1 Lev. 49 : 2 Bulstr. 29 : Hob. 254.

But although the effect of the wife's remitter necessarily extends to restore and remit all remainders dependent upon her estate; yet that effect and consequence may cease, and those remainders and estates may be again turned into rights, as they were before the wife's remitter by the discontinuance of her husband. As an instance of this—

Suppose the husband and wife to be seised of an estate tail with remainders over, and the husband *alone* to levy a *fine* with proclamations to the use of himself and wife in tail, with remainders over, and that they are in possession under the fine, both she and her husband are remitted, as also are the old remainders; and *if* she survive him, there will be no cesser of this remitter; but *if* the husband survive her, then the remitter of the remainders ceases with her particular estate upon which they were dependent; because upon the death of the wife, the law adjudges the husband to be seised from that time of the estate taken to himself by the fine; and all the other new estates created by such fine are restored by the ceasing of the remitter; in which new course the land will continue to go so long as there are issue inheritable under the old intail, who, notwithstanding their estoppel, by the fine of their father, from claiming the estate contrary to its uses, are, during their existence, sufficient to exclude the taking of the old remainders; for although the fine could not bar such remainders, yet it was competent to pass the old estate tail, by barring the issue of their claim, since they must deduce their title as heirs of the body of the person who levied such fine. The second fee simple having been restored, as above, it is a necessary consequence that the old remainders should be turned into *rights* to remainders only, for there cannot be two co-existent fee simples of the same estate, so that by the event of the husband surviving his wife, the result is the same as to the old estates as if there never had been a remitter; yet they are under the protection of the statute of the 32d of Henry the Eighth, and the persons intitled to them may enter after the death of the husband and the failure of his issue. It must, however, be noticed, that if in the case proposed the wife had survived her husband, her entry within five years from his death would have been necessary to have defeated the fine with proclamations, as appears from what has been stated in the last section. To the able judgment given by Lord Hobart, in the case of *Duncombe v. Wingfield* (a), in

(a) Hob. 254.

which many points of the doctrine of remitter are discussed and elucidated, the reader is referred.

It has been supposed that in all cases the wife is at liberty to *elect* to waive her right to remitter under the act of the 32 of Henry the Eighth, and to take under the statute of uses (*a*); but it is presumed that the following distinctions now prevail on the subject since the passing of those statutes: an entry by husband and wife, after his taking the defeasible estate to himself and wife, will remit her to her ancient right (*b*), and which remitter, it is conceived, she cannot afterwards waive (*c*); but if they do not enter, then that they are seised of the defeasible estate during the marriage under the statute of uses, such estate being liable to avoidance after the husband's death by his wife's entry under the statute of Henry the Eighth; and that if she do not enter, there is no remitter (*d*); and it is presumed that if she enters, the law by immediate operation upon her entry (a common law-right) instantly remits her to her ancient title without regard to her election. (*e*) But as by that law the wife was at liberty to elect between her two rights, when both were voidable by her after her husband's death, and such liberty of election did not prejudice another person (*f*): so it seems, that since the passing of the two statutes, when she takes both rights subsequently to the marriage (to both of which she may dissent after the death of her husband, and therefore avoid), she may elect to take either of them; and according as she elects, she will either take under the statute of uses, which precludes remitter, or under the act of the 32 of Henry the Eighth, which will cause her to be remitted.

As an instance of this the wife's election: —

Lands were given to husband and wife in tail, remainder to the right heirs of the husband. After having issue, the husband alone levied a fine with proclamations to his own use: which barred the issue in tail. He then devised the land to his wife for life, with remainder to a stranger in fee; and charged it with the payment of a rent. The husband died, and his wife entered, claiming only an estate for life, and paid the rent-charge, and afterwards died; and it was adjudged that she had waived her prior estate tail. (*g*)

(*a*) Co. Litt. 347 *b*, note 1.

(*b*) 2 Bulstr. 29: Hob. 254.

(*c*) Co. Litt. 357.

(*d*) 1 Lev. 49: Co. Litt. 363 *b*: Cro. Car. 145: 2 Bulstr. 29.

(*e*) See Hob. 71, 255: 2 Roll. Rep.

33: Cro. Jac. 489.

(*f*) *Supra*, p. 478.

(*g*) Dyer, 351 *b*.

The following is another instance of the wife's election :

In Hawtrey's case (*a*), King Henry the Eighth, by letters patent, gave lands to husband and wife, and to the heirs of the husband, to hold *in capite* ; the husband encoffed A and B to the use of himself and his wife for their lives, with remainder to the use of a younger son for life, with remainder to the husband in fee. The husband died, his heir being within age, and in ward to Queen Elizabeth for other lands *in capite* ; but the wife held the possession, and claimed her *first* estate. Whether the Queen should have the third part of this land in ward or not depended upon the question, whether the wife was or was not remitted to her first estate? And the Court, after considering the statute of uses and the act of the 32d of Henry the Eighth, held that the wife was remitted; for that she had *election* to be in according to the statute of uses, or by the latter statute, since her entry thereby was congeable.

In cases where the wife has the power of election, it is presumed that if she and her husband enter under the new defeasible estate, her remitter during the marriage will be *sub modo*, *i. e.* until she be at liberty to elect; which will happen if she survive her husband. (*b*) And if she enter generally without expressing in respect of which of her two rights the entry is made, the law will remit her to her first title. (*c*)

The beneficial effects of the wife's title by remitter appear from the following observations:—It avoids all grants and incumbrances made between the discontinuance and the remitter.

Accordingly, if the discontinuee of the husband grant a rent or make a charge upon the estate, the remitter will defeat them, because the wife by her remitter holds by her prior and paramount title. (*d*) Again,

Remitter to the principal remits also to every thing appendant or accessory to it.

Thus, if husband and wife be seised in tail of a manor to which an advowson is appendant, and it is severed from the manor by the discontinuee, or he reserve it to himself in a regrant of the manor to the husband and wife for their lives, in both cases the remitter of the wife to the manor the principal will be a remitter to the advowson the accessory. But if the advowson alone had been regranted, there

(*a*) Dyer, 191 b.

(*d*) Co. Litt. 349.

(*b*) Co. Litt. 357.

(*c*) Ibid.: Gilb. Uses, 155 : 18 Vin. Ab. 454, pl. 2.

would have been no remitter of it, because the grant reconveyed a mere *title*, the *right* being in the person seised of the manor, and upon a bare title there can be no remitter (*a*); for no person can have or claim a *right* in the accessory who has no right in the principal. This doctrine as to remitter, applies to all inheritances regardant, appendant, or appurtenant.

The above are advantages, amongst others, which the wife derives from her remitter. If she were to take under the statute of uses, she would then come to the estate by a *new* title as a purchaser, and must be liable to all the charges and incumbrances which may have been made upon it since the discontinuance, and she must lose the accessories to her estate, which had been severed from it or reserved by the deed of regrant.

How and to what extent the statute of uses operates in alteration of the common-law rule of remitter is the last point to be considered.

According to the doctrine of Lord Hobart, before stated (*b*), the first taker of *every several* estate as well in *remainder* as in *possession* will not be remitted when the second or new estate is limited by way of *use*, and the *cestuique uses* have rights of *action* only to recover their old or prior rights or estates. In order to illustrate this—

Suppose B to have been seised in tail with remainder to C in tail, and to have been disseised by A, who after being in peaceable possession of the estate for five years (*c*), died seised; and that the tortious fee acquired by the disseisin descended to D his heir, by which descent the *entry* of B was *toll*ed or taken away, and then D the heir limited again the estate, by way of use, to B in tail, &c. It seems that the remitter would take place thus—B during his life will not be remitted, as he took the first several estate in possession; and if B die without issue, C will not be remitted, because he took the *second several* estate in *remainder*.

But it is adjudged that the words of the statute of uses are satisfied by the application of them to the first takers of each several estate as above, and that the persons claiming under each of those persons as the stocks or purchasers, since they take or succeed by descent to their estates, such estates are subject to and regulated by all the rules and incidents of the common law, and consequently to remitter. In the above case, then, although B cannot be remitted, yet if he leave issue they will be remitted, because their title is by descent; but if

(*a*) Co. Litt. 349 *b*.

(*b*) *Ant*é, p. 481.

(*c*) Mr. Roper refers to stat. 32 H. 8, c. 33: and vol. i. p. 64, of his treatise.

he leave none, as first supposed, then, although C cannot be remitted as a taker of the *first several* estate in remainder as a purchaser, yet if he leave issue they will be remitted, &c. &c.

A case, however, may occur when the taker of a remainder may be remitted contrary to the above doctrine. This will happen when a remitter takes place under a limitation prior to the remainder: and the reason is, that the remitter of a prior estate has the effect of remitting to all subsequent ones dependant upon it.

Thus, in the case above proposed, if B died leaving issue, who upon his death are remitted as we have seen, such remitter would be a remitter of C in remainder, and of all subsequent estates. (a)

In the remainder before mentioned, C has been supposed to be an indifferent person, but the rule would be the same if C were a married woman, the statute of the 32d of Henry the Eighth applying to the discontinuances by the husband only, and giving the wife a right of entry in those cases: whereas in the case above supposed, the discontinuance by B turned the remainder in C to a mere right, recoverable by action only; which in regard to remitter, under the statute of uses, placed the wife in the same situation as any other person, and as C as above.

No. IX.

Whether Election against an Instrument requires Forfeiture of all Interest under it, or Compensation only. By Mr. Jacob. (b)

It has recently become a question in what manner the principle of election is to be enforced, in cases where a party being called upon to elect under an instrument purporting to dispose of his property, and at the same time conferring other benefits upon him, elects to retain his own property in opposition to the instrument. According to some opinions, his election is followed by a forfeiture of the whole of that which the instrument gives him, the property thus forfeited passing to the parties disappointed by the election which he has made. See Sugden on Powers, p. 380. According to others, the party thus

(a) Hob. 256.

vol. i. p. 566. of his edition of Mr.

(b) *Vide supra*, vol. I. p. 547. These
remarks formed a note by Mr. Jacob to
Roper's treatise.

electing is bound to relinquish only so much of the property given to him as will be sufficient to compensate the disappointed parties. The question has been elaborately considered by Mr. Swanston, in a note, in which the authorities are collected and compared with great learning and research : he arrives at the following conclusion :—"This deduction of authorities appears (in the instance at least of election under wills and deeds of donation) to establish two propositions; 1. That in the event of election to take against the instrument, Courts of Equity assume jurisdiction to sequester the benefit intended for the refractory donee in order to secure compensation to those whom his election disappoints; 2. That the surplus after compensation does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the Court controlled his legal right." 1 Swan. 441.

In two late cases, this point became the subject of direct discussion. In *Green v. Green* (19 Ves. 665; 2 Mer. 86), the question arose under a marriage settlement, by which an estate belonging to the wife's family, and an estate supposed to belong absolutely to the husband's father, but which was in fact subject to a prior entail, were settled to the same uses. The Lord Chancellor intimated an opinion, that if the son of the marriage claimed the entailed estate against the settlement, he must give up the whole of the interest which under the settlement he took in the other estate. The observations in his Lordship's judgment seem to favour the opinion, that election under a will requires compensation only, but he thought that rule could not be applied to a deed founded on contract.

This case may be considered as deciding, that in the instance of a deed founded on contract, a party electing to dispute it forfeits the whole of the benefits which he might have taken under it. It was not necessary to decide in what manner the property thus forfeited was to be applied.

The question was again discussed in *Tibbits v. Tibbits*, a case arising upon a will. The circumstances are stated in 2 Mer. 96, note, and 19 Ves. 656. The Lord Chancellor gave judgment on the 28th of June, 1821. The question, he said, was whether the defendant, in the event of his electing to take against the will, was bound to forfeit all the benefits he took under it, or whether he was only to make a compensation to the plaintiffs for what the testator intended them. On this point he had looked through all the cases with great attention, and they contained many *dicta*, not easily re-

conciled. Though it would perhaps be too much to say that that should be the rule universally, he thought this was a case for compensation only. At the same time he was of opinion, that there might be cases where not only compensation was to be made, but the whole was to be given up. He thought the old principle of the Court, till shaken by some later determinations, was compensation ; but it had since been shaken.

This decision appears to point at a distinction between some cases of election under wills where compensation only is to be required, and others where it may be necessary to relinquish the whole property, and leaves it open to inquire what may be the circumstances distinguishing the cases, and the principle of the distinction between them.

The Lord Chancellor has observed that there [is no point upon which a greater variety of decision appears, and that it is impossible to reconcile the doctrine to be collected from the cases. 19 Ves. 666, 667. No expectation can therefore be entertained of any solution entirely disembarassing the subject from the difficulties in which it is involved : but a consideration of the principle of the doctrine will suggest an hypothesis, by which some of the apparent contradictions would be removed.

The principle on which the doctrine of election is commonly said to be founded is, that an implied condition is supposed in equity to be annexed to the devise. A consistent adherence to this principle would require that Courts of Equity, having once assumed the existence of this condition, should follow it up by consequences analogous to those which would ensue from a similar condition actually expressed ; and, therefore, that a refusal to perform the condition should be treated as a forfeiture or relinquishment of the estate devised.

The consequence would be, that the estate would devolve as undisposed of on the heir at law, had not the Courts held that an equity arises in favour of the parties disappointed by the election, intitling them to have the property which is thus rejected applied to compensate their loss. It has been doubted whether this doctrine be well founded, see 1 Swan. 424, *et seq.* It is, however, supported by analogy to some cases in which Courts of Equity have assumed jurisdiction to apply property forfeited by the breach of an express condition, in compensation of a loss occasioned by that breach of condition. See *Webster v. Mitford*, 2 Eq. Ca. Ab. 363 ; 1 Swan.

435. 449. If an estate be devised to A, on condition of his paying a legacy to B, a breach of the condition intitles the heir to enter; but in equity he will be deemed a trustee of the estate for B, to the extent necessary for raising the legacy. See *Wigg v. Wigg*, 1 Atk. 383; and 2 Freem. 278. If this equity of compensation be rightly administered against the heir, when a forfeiture is incurred by breach of a condition to pay a sum of money to another, it ought by analogy also to prevail in the case of a forfeiture incurred by breach of a condition to give up any other species of property. But this equity between the disappointed devisee and the heir, cannot reasonably be extended beyond the object of making compensation to the former, and therefore it would seem that if the property relinquished should happen to be more than sufficient to afford that compensation (an event of course improbable) the surplus would be left to the heir at law. Thus the rule of election may perhaps be, that the property rejected by the electing party descends as undisposed of, subject to the charge of compensating the disappointed devisee. If this be the rule, the authorities in favour of forfeiture become reconcilable with many of those which speak of compensation: the former referring to what one party is to lose, the latter to what the other party is to receive.

In *Rich v. Cockell*, 9 Ves. 379, the Lord Chancellor is reported to have said, "All election goes upon compensation. If by a will, which gives A's estate to B, an estate is given to A, he may say he will keep his own estate: the compensation upon which the Court goes, is the implied condition of which the other is to have the benefit; that whoever takes in consequence of the election, shall take it *cum onere*." The former part of this passage may admit of different interpretations, but the conclusion can scarcely be understood, except as implying, that an election against the will, casts the devised property on some one else, who takes it subject to the burthen of making compensation.

In *Ker v. Wauchope*, 1 Bligh, 21, the Lord Chancellor says: "It is equally settled in the law of Scotland, as of England, that no person can accept and reject the same instrument. If a testator gives his estate to A, and gives A's estate to B, Courts of Equity hold it to be against conscience that A should take the estate bequeathed to him, and at the same time refuse to effectuate the implied condition contained in the will of the testator. The Court will not permit him to take that which cannot be his, but by virtue

of the disposition of the will; and at the same time to keep what by the same will is given or intended to be given to another person. It is contrary to the established principles of equity that he should enjoy the benefit while he rejects the condition of the gift." After adverting to some other points, his Lordship proceeds to consider in what manner the property relinquished is to be disposed of. "But as the appellants have in fact to a certain extent annulled the deed by judicial process, their election is thereby made to take nothing under the repudiated instrument. A question then arises, what is to become of the life interest, which the appellants cannot take either as legatees, or as next of kin? In our courts, we have engrafted upon this primary doctrine of election, the equity, as it may be termed, of compensation. Suppose a testator gives his estate to A, and directs that the estate of A, or any part of it, should be given to B. If the devisee will not comply with the provision of the will, the Courts of Equity hold that another condition is to be implied as arising out of the will and the conduct of the devisee; that inasmuch as the testator meant that his heir at law should not take his estate which he gives A, in consideration of his giving his estate to B; if A refuses to comply with the will, B shall be compensated by taking the property, or the value of the property which the testator meant for him, out of the estate devised, though he cannot have it out of the estate intended for him." *Ibid.* p. 25.

The first of these passages plainly implies, that A, on refusing to give up his own estate, forfeits all the benefits intended for him by the will. If he might elect to make compensation only, retaining the surplus, it would be permitting him to take that which could not be his except by virtue of the will. The equity of compensation is then spoken of as a secondary doctrine, distinct from that of election, and is treated as a question arising between the disappointed devisee and the heir at law, after the claim of A has been displaced by his election. Thus the process is twofold: the doctrine of election takes the estate from the party electing, and the disappointed devisee is then by a distinct doctrine held to have an equity as against the heir to claim a compensation. That equity of course can attach only to the extent required for the purpose of compensation, and if a surplus remain, A being excluded from taking any thing under the repudiated instrument, it must result to the heir.

In *Vane v. Dungannon*, 2 Sch. & Lef. 130, Lord Redesdale, in decreeing that a party must elect, observed that if she elected against

the will she must give up *all* that she took under it: he added, that she was to give it up in order to compensate the loss sustained by the other parties. Entire forfeiture on her part was, therefore, to be the consequence; but the use of the word "compensate" implies that the others were not to receive more than an equivalent. It follows that the surplus, if any, would be undisposed of.

The decree in this case, indeed, directs that in case of an election against the will, the benefits given by the will to the party so electing should be divided between the others, in proportion to the shares of which they would be disappointed, without providing for the event of a surplus remaining: and in *Ker v. Wauchope*, and some other cases, expressions are to be found, intimating that all the property forfeited would be applied to the purpose of compensation. This may be thought to sanction the opinion, that in all cases the disappointed devisee takes the benefit of the forfeiture, whatever may be the value. But the authorities, in speaking continually of compensation for a loss, as that to which the party is intitled, are inconsistent with the idea that he can take the whole, if more than equivalent to the amount of his loss; and it is therefore more probable, that the expressions alluded to above have proceeded on an assumption (which would naturally be made) that the property given by the will, if relinquished, would not be more than sufficient to yield a compensation. If election against the will be attended with forfeiture of the property devised, it is of course not likely that the party electing should make so capricious a choice as to give it up, unless inferior in value to the property intended to be given away from him. The event of a surplus remaining is therefore, in general, so highly improbable, that it is not surprising that it should not be contemplated, and should not be specifically provided for in the decree made in the first instance.

For this reason, if the property be forfeited by the party electing, the question whether the other is to take the whole, or whether he is to take a compensation out of it, leaving the surplus to descend as undisposed of, is of no practical importance, in cases where the surplus would descend to a third person, for in such cases no surplus would remain. But it becomes material, with reference to that class of cases where the person who is to elect is also the person upon whom the surplus (if considered as property undisposed of) would devolve: as in cases where the heir at law is put to elect by a devise from his ancestor.

If the doctrine of election be founded on analogy to the rules relating to conditions, it must necessarily admit of some modification

in its application to the case of an heir at law. A devise to the heir being inoperative, and he being himself the person to take advantage of any forfeiture, a mere condition annexed to a devise to him cannot be enforced in the same way as against a stranger: it has no effect, except where the doctrines of Courts of Equity consider it as a trust attaching on the estate, as in the case of a devise to the heir, on condition of paying a sum of money to a third person. See *Anon.* 2 *Freem.* 278. So where a case of election is raised against the heir by a devise to him, he is treated as a trustee for the other objects of the testator's bounty, to the extent of the bounty intended for them. "The devise is read," says Sir William Grant, "as if it were to the heir absolutely, if he confirm the will; if not, then in trust for the disappointed devisees, as to so much of the estate given to him, as will be equal in value to the estates intended for them." 2 *Ves. & B.* 191. Thus in such cases the compensation is deducted from that which is devised to the heir. The surplus, if any, belongs to him in his character of heir.

Similar observations apply to cases where the party electing fills any other character, by which the property would be his independently of the will. If the disappointed devisee be intitled to compensation only, the surplus being undisposed of would result to the party who has made the election.

This distinction may possibly reconcile the authorities in favour of the doctrine of forfeiture, with most of those in which the judgments or decrees admit a right of electing against the will on the terms of making compensation only, and retaining the surplus. The latter have chiefly been cases in which the defendant was the heir at law of the testator, put to elect between estates devised to him by the will and estates claimed against the will under a previous entail. *Anon.* *Gilb. Eq. Rep.* 15. *Streatfield v. Streatfield*, *Cas. Temp. Talb.* 176; 1 *Swan.* 447. *Welby v. Welby*, 2 *Ves. & B.* 187. *Tibbits v. Tibbits*, *ub. sup.* In *Noyes v. Mordaunt*, 2 *Vern.* 581; *Gilb. Eq. Rep.* 2, the defendant was one of the testator's co-heiresses.

The case of *Bor v. Bor*, 7 *Bro. P. C.* 167. ed. Toml., is conformable to this distinction. The judgment of Lord Hardwicke lays down the general rule of forfeiture: "That when a father disposing of his estate, happens to give a younger son what was settled upon the elder, and at the same time gives the elder son some other provision; if the elder will defeat the will in any part, he shall not at the same time take any benefit under it." *P.* 178. The language of the decree which followed this judgment, intimates that, if the circumstances had

raised a case of election against the appellant, he would have been called upon to elect whether he would abide by the devise, or convey to the respondent so much of the lands taken under the will as should be equal in value to the entailed estates retained in opposition to it. In this case the appellant was the heir of the testator's second son: the eldest having died without issue, he had become the testator's heir.

In the case *Rich v. Cockell*, 9 Ves. 369, it was admitted in the argument, and the Lord Chancellor seems to have agreed, that the defendant, if bound to elect, might elect to make compensation only: the defendant's wife had bequeathed to him part of her separate property, and had by the same will given away other property which he claimed as his own. The separate property given him by the will would, independently of the will, have devolved upon him *jure mariti*; and the opinion intimated in this case therefore falls within the distinction mentioned above.

On the other hand, in *Green v. Green*, the estate which the defendant took under the instrument, could not have been his except by virtue of that instrument, and it was considered that he was bound to relinquish it *in toto* if he insisted on his other claims.

But whether this suggestion be or be not well founded, the weight of the authorities, as well as the principle on which the doctrine of election is considered to be founded, appear strongly to support the conclusion, that the cases alluded to above have proceeded upon some distinct grounds; and they do not establish as an universal rule, that the party who refuses to comply with the implied condition of the devise can retain any part of the benefits conferred on him by the will.

The language usually employed by the Courts on the subject of election, is decidedly inconsistent with the existence of such a rule. The familiar expression, that a party cannot take under and against the same instrument, cannot mean that he may take partly under it, and partly against it. When it is said, that he is to choose which of two estates he will take, does it imply that he may choose the whole of one, and part of the other? The expressions, that no man shall take any thing under an instrument without conforming to it, as far as he is able, and giving effect to every thing contained in it, (2 Ves. Jun. 370); that he must abide by the will *in toto*, or by his paramount claims *in toto*, (3 P. W. 124; 2 Atk. 43); that no person puts himself in a capacity to take under an instrument without performing the conditions of it, express or implied, (2 Sch. & Lef. 267); and that he can

take nothing under an instrument which he repudiates, (1 Bligh, 25), are all repugnant to the notion that one who elects to take in opposition to a will, can avail himself of that will, to claim the surplus of the property devised; while they leave it open to him to make that claim, by any other title independent of the will.

In some cases, the decrees (as far as they are stated in the Reports) do not appear to have gone further than to declare that the defendant must elect to take under or against the will, or that he must elect between the two estates. (1 Swan. 413; 1 Dow, 252; 2 Sch. & Lef. 455; Belt's Supplement, 155.) This declaration alone would not imply that there was any middle course between an entire adoption and an entire rejection of the will. In other instances, the decrees, after directing the election to be made, have proceeded to specify the consequences of each alternative, in terms plainly indicating, that an election against the will is to be followed by an extinguishment of all title under it; in some cases declaring that the defendant will not be intitled to any benefit under the will, (*Morris v. Burroughs*, 1 Atk. 404: *Pulteney v. Darlington*, 7 Bro. P. C. 546, ed. Toml. : *Blount v. Bestland*, 5 Ves. 517); in others directing that all that has been, or may be received under the will, shall be accounted for. (*Macnamara v. Jones*, 1 Bro. C. C. 482, note, ed. Belt: *Vane v. Dugannon*, *ub. supra*.)

The observations made by Lord Chief Justice De Grey, in one of these cases, *Pulteney v. Darlington*, have generally been considered adverse to the opinion, that all the benefits conferred by a will must be relinquished by one who elects against it. Only a few passages of his judgment have been reported, (2 Ves. Jun. 560: 3 Ves. 530); it is not easy to interpret them with certainty, but it may be doubted whether they necessarily bear the meaning imputed to them.

The decree directed that Mrs. Pulteney, a married woman, should make her election. On a rehearing, the Lord Chancellor Bathurst was assisted by Lord Chief Justice De Grey and Baron Eyre. It appears (from the statement of Lord Rosslyn) that one of the objections urged against the decree was, that Mrs. Pulteney, being a married woman, could not defeat her husband's interest, and therefore was unable to elect: she had, it was said, no alternative. The argument therefore raised this difficulty, that in a case of election, a married woman, not being able to perform the condition of giving up her own estate, would (unless her husband was willing to convey) necessarily forfeit what was devised to her. The observations in

question seem to have been designed to meet this objection. "In answer to that, the Chief Justice distinguishes the equity of this Court from an express condition," which, he says, "must be performed as framed; and if not it would induce a forfeiture; but the equity of the Court," (as he very well expresses it), "is to sequester the devised interest *quousque*, till satisfaction be made to the disappointed devisee." The first part of this passage implies, that the difficulty raised by the argument would exist in the case of an express condition that a married woman should give up an estate: if unable to perform it, *modo et formâ*, she would incur a forfeiture. The second part shows that this difficulty would not exist in the case of election: treating of the case of a party under disability, it distinguishes between the strict rule of forfeiture for breach of a legal condition, and the mode in which election would be enforced in equity. It seems intended to imply that the married woman, if unable to make and perfect her election, would not incur an immediate forfeiture; but that the enjoyment of the devised estate would, in the mean time, be withheld. The natural meaning of sequestering the estate *quousque* is, not that a part is to be taken away for ever, but that the whole is to be detained for a time. Lord Rosalyn, who quotes the passage, adopted a similar idea in a case occurring a short time afterwards, in which he again referred to this judgment: "Therefore the Court says, there shall be an election, and gives an opportunity of electing, and will not easily hold the election concluded. But if the party is under restraint, and cannot accomplish that, it is the misfortune of the party: but the consequence is, that while he continues in that situation his claim must be barred." 2 Ves. Jun. 697.

A presumption in favour of this view of the Chief Justice's judgment arises also from the fact, that the declaration of the decree was not varied on the rehearing. Mrs. Pulteney was to make her election, whether she would take under the will of Sir William Pulteney, or under that of General Pulteney: and in case she should elect to take an estate tail under the will of Sir William Pulteney, it was declared that she would not be intitled to any estate under the will of General Pulteney. It was subsequently referred to the Master, to inquire which election would be most for her benefit: and he reported that it would be for her benefit to take under the will of Sir William Pulteney; and an arrangement was then agreed on, by which the benefits given to her by General Pulteney's will were

valued, and she secured the amount for the benefit of the disappointed devisees. 2 Ves. Jun. 553: 3 Ves. 385. This arrangement followed the principle of the decree: by the election against the will of General Pulteney, she forfeited the right which the will gave her to his property; but instead of relinquishing the property in specie, it was agreed that she should give the value of it in money.

The remarks of Lord Rosslyn on the first hearing of *Cavan v. Pulteney*, 2 Ves. Jun. 560, appear contrary to the view here taken; but when the case was a second time before him, his expression was that the will must be understood to impose upon Mrs. Pulteney, "in nature of a condition, an obligation to conform to the will, or if she did not, to forfeit all the interest she took under it." 3 Ves. 385. In another case he says, "that the Court cannot execute a will by parcels; it must be totally; or with regard to the party, by whose means it fails, the Court can do nothing for that party." 2 Ves. Jun. 697.

It may be remarked, that in *Pulteney v. Darlington*, Mrs. Pulteney was the cousin and heir at law of General Pulteney, against whose will she elected to take; and if, therefore, an opinion was entertained that she might take the property devised, subject to the obligation of making compensation, it may perhaps be referred to the distinction alluded to above. The declaration of the decree confined the forfeiture to the rights which she had by virtue of the will.

It is apparent, that if the rule of election permitted the party contravening the will to retain the property given by it, subject to a deduction for compensation, there would be little security in any case for the performance of the testator's intention. According to either rule, the election is of course against the will, where the property given by it is less valuable than that which the testator attempts to give away from the defendant. If it be more valuable, it would, according to the rule of forfeiture, be equally of course, that the defendant would elect to confirm the will. But upon the contrary supposition, the choice would be indifferent to the defendant, in point of pecuniary benefit. If he took under the will, he would be intitled to the larger property. If he took against it, he would retain the smaller property, and the difference would be made up to him, by his receiving the surplus value of the other. No benefit could be gained by effectuating the intention, and nothing could be lost by defeating it.

Hence, upon this principle, a knowledge of the value of the two funds would not be essential, to enable the defendant to make his election with safety. By electing against the will, he would in every case secure himself from loss; and there would be no necessity for postponing his determination till after the accounts were taken, and the value ascertained, or for references to a Master, in the cases of infants and married women.

In *Pulteney v. Darlington*, Lord Chief Justice de Grey, adverting to the situation of the husband of a married woman who is decreed to elect, observes "that the most favourable supposition for him is to consider him as having an estate that rises and falls with hers, 'because otherwise he takes against the will.' 2 Ves. Jun. 560. This observation could scarcely have been made, if a party taking against the will were put in possession of the whole amount, which he could obtain by taking under it."

No. X.

Of the Acknowledgment of Deeds by married Women under the 3 & 4 W. 4. c. 74. (a)

It is enacted by section seventy-nine of the above statute, that every deed to be executed by a married woman, for any of the purposes of the act, except such as may be executed by her in the character of protector, for the sole purpose of giving her consent to the disposition of a tenant in tail (b), shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of one of the superior courts at Westminster, or a Master in Chancery, or before two of the perpetual commissioners, or two special commissioners to be respectively appointed as thereinafter provided. ens 62/77.

By the eightieth section, the judge, Master in Chancery, or commissioners, before receiving the acknowledgment by any married woman of any deed by which any disposition, release, surrender, or extinguishment shall be made under the act, are to examine her (c),

(a) *Vide supra*, vol. II. p. 48.

in the same manner as if she were a feme sole.

(b) By sec. 45, the consent of a married woman protector is to be given

(c) In a late case, where the wife

apart from her husband, touching her knowledge of such deed, and to ascertain whether she freely and voluntarily consents to the deed, and unless she freely and voluntarily consent to the deed, shall not permit her to acknowledge the same (a): and in such cases the deed, so far as relates to the execution thereof by the married woman, is to be void.

By the eighty-first section, for the purpose of providing convenient means of taking acknowledgments by married women, the Lord Chief Justice of the Court of Common Pleas at Westminster is from time to time to appoint such persons as he shall think fit, for every county, riding, division, soke, or place for which there may be a clerk of the peace, to be perpetual commissioners for taking such acknowledgments, and such commissioners shall be removeable by and at the pleasure of the Lord Chief Justice; and lists of the names of such commissioners for the time being, with the names of their places of residence, and the counties, ridings, divisions, sokes, or places for which they shall be respectively appointed to act, shall from time to time be made out, and be kept by the officer of the Court of Common Pleas at Westminster, with whom the certificates of the acknowledgments by married women are to be lodged as thereafter mentioned; and the officer is from time to time to transmit, without fee or reward, to the clerk of the peace for each county, riding, division, soke, or place, or his deputy, a copy of the list to be so from time to time made out for that county, riding, division, soke, or place, and to deliver a copy, signed by him, of the list for the time being for any county, riding, division, soke, or place, to any person applying for the same; and the clerk of the peace for each county, riding, division, soke, or place, or, his deputy is to deliver a copy signed by him of the list last transmitted to him, to any person applying for the same.

The eighty-second section provides, that any person appointed commissioner for any particular county, riding, division, soke, or place, shall be competent to take the acknowledgment of any married woman wheresoever she shall reside, and wheresoever the lands or

was deaf and dumb, her acknowledgment was directed to be filed, the nature of the transaction having been explained to her by signs, and she in like manner testifying her assent, and these facts appearing upon the affidavit, and also upon the certificate: *re Harper*, 6 Man. & G. 732; 7 Scott, N. R. 431.

(a) Where a married woman, who is a trustee, refuses to acknowledge the deed, it seems that she is a trustee within the meaning of the statute of the 11G. 4. & 1 W. 4. c. 60: *Billing v. Webb*, 12 Jur. 427.

money in respect of which the acknowledgment is to be taken may be. (a)

By the eighty-third section, in those cases where, by reason of residence beyond seas, or ill health, or any other sufficient cause, any married woman shall be prevented from making the acknowledgment required by the act before a judge, or a Master in Chancery, or any of the perpetual commissioners, the Court of Common Pleas at Westminster, or any judge of that Court, may issue a commission, specially appointing any persons therein named (b) to be commissioners to take the acknowledgment by any married woman to be therein named (c) of any deed, provided that every commission be made returnable within such time, to be therein expressed, as the Court or judge shall think fit.

By the eighty-fourth section, when a married woman shall acknowledge any deed, the judge, Master in Chancery, or commissioners taking the acknowledgment, shall sign a memorandum to be indorsed on or written at the foot or in the margin of the deed, which memorandum, subject to any alteration which may from time time be directed by the Court of Common Pleas, shall be to the following effect; videlicet,

"THIS deed, marked [*here add some letter or other mark for the purpose of identification*], was this day produced before me [*or us*] "and acknowledged by —, therein named, to be her act and deed; "previous to which acknowledgment, the said — was examined "by me [*or us*] separately and apart from her husband, touching "her knowledge of the contents of the said deed, and her consent "thereto, and declared the same to be freely and voluntarily executed "by her."

And the same judge, Master in Chancery, or commissioners, shall also sign a certificate of the taking of such acknowledgment, to be

(a) Although the commissioners may take the wife's acknowledgment wherever she may reside, and wherever the property may be, they can only act in the county for which they are appointed: Webster to Carline, 4 Man. & G. 27. They have a lien on the deed, certificate, &c. for their fees: *Ex parte* Grove, 3 Bing. N. C. 304; 3 Scott, 671.

(b) Where the acknowledgment had been taken in a remote part of India, under particular circumstances, before

two persons who were not named in the commission, the Court allowed the commission to be amended by the insertion of their names: Stubbs to Oakley, 4 Man. & G. 609; *in re* Stubbs, 5 Scott, N. R. 327.

(c) The Court has allowed the commission to go out with a blank for the wife's christian name: *In re* Apperton, 1 C. B. 447; S. C. *re* Atherton, 3 Dowl. & L. P. P. 26; 14 Law J. N.S. C.P. 225.

written or engrossed on a separate piece of parchment; which certificate, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect; videlicet,

" THESE are to certify (a), that on the day of , in the year
 " one thousand eight hundred and , before me, the under-
 " signed Sir *Nicholas Conyngham Tindal*, Lord Chief Justice of the
 " Court of Common Pleas at *Westminster* [or before me, Sir *James*
 " *Parke*, Knight, one of the justices of the Court of King's Bench at
 " *Westminster*; or before me the undersigned *James William Farrer*,
 " one of the Masters in ordinary of the Court of Chancery; or
 " before us *A. B.* and *C. D.*, two of the perpetual commissioners
 " appointed for the for taking the acknowledgments of
 " deeds by married women pursuant to an act passed in the
 " year of the reign of His Majesty King *William* the Fourth, intituled
 " *An Act* [insert the title of this act]; or before us, the undersigned
 " *A. B.* and *C. D.*, two of the commissioners specially appointed
 " pursuant to an act passed in the year of the reign
 " of His Majesty King *William* the Fourth, intituled *An Act*
 " [insert the title of this act] for taking the acknowledgment
 " of any deed by — the wife of —] appeared personally —
 " the wife of (b) — and produced a certain indenture, marked
 " [here add the mark] bearing date the day of , and made
 " between [insert the names of the parties], and acknowledged the
 " same to be her act and deed; and I [or we] do hereby certify,
 " that the said — was, at the time of her acknowledging the said
 " deed, of full age (c) and competent understanding, and that she

(a) It is not necessary to state in the certificate the specific place at which the acknowledgment has been taken; it is sufficient if the deed appear to have been executed within the terms of the commission: *Ex parte Hutchinson*, 17 Law J. N. S. C. P. 111.

(b) Where the certificate described the wife as *Mary*, the reputed wife of *A.*, otherwise *Mary* —, spinster, and she was similarly described in the deed, the affidavit and certificate were allowed to be filed: *In re* —, 17 Law J. N. S. C. P. 110.

(c) But where the wife, being an infant, was a trustee, and was directed to

convey the estate under the 11 G. 4. & 1 W. 4. c. 60, the Court directed an order to be drawn up, authorising the commissioners in their certificate to omit the words "of full age:" *In re Luke*, 1 Scott, 80; 1 Bing. N. C. 265; 3 Dowl. P. C. 113.

Where the parties were living in *Van Diemen's Land*, the certificate being regular, but there being no positive affidavit that the wife was of full age, the defendant merely stating his belief, the Court would not permit the certificate to be filed without a positive affidavit that the wife was of full age: *In re Coverley*, 8 Scott, 147.

“ was examined by me [*or us*], apart from her husband, touching
 “ her knowledge of the contents of the said deed, and that she freely
 “ and voluntarily consented to the same.”

By the eighty-fifth section, every certificate of the taking of an acknowledgment by a married woman of any deed, together with an affidavit by some person verifying the same (*a*), and the signature thereof by the party by whom the same shall purport to be signed, is to be lodged with some officer of the Court of Common Pleas at Westminster to be appointed as thereafter mentioned; and the officer is to examine the certificate, and see that it is duly signed, either by some judge or Master in Chancery, or by two commissioners appointed pursuant to the act, and duly verified by affidavit as aforesaid, and also that it contains such statement of particulars as to the consent of the married woman as shall from time to time be required in that behalf; and if all the requisites in the act in regard to the certificate shall have been complied with, then the officer is to cause the certificate and the affidavit to be filed of record in the Court of Common Pleas.

By the eighty-sixth section, when the certificate of acknowledgment shall be so filed of record, the deed so acknowledged is, so far as regards the disposition, release, surrender, or extinguishment thereby made by any married woman whose acknowledgment shall be so certified concerning any lands or money comprised in such deed, to take effect from the time of its being acknowledged, and the subsequent filing of the certificate is to have relation to the acknowledgment.

(*a*) Where the certificate stated that the wife “freely and voluntarily consented” to a deed, and the affidavit stated that she consented to it on condition of a provision being made for her by her husband’s will, and which had been made, and which she knew to be revocable, the Court, considering the certificate and affidavit to be contradictory, refused to order the officer to file them: *In re Mary Dixon*, 16 Law J. N. S. C. P. 231.

So, where the certificates stated two married women to have executed deeds of lease and release, whereas they were parties only to the release, the Court refused to amend the certificates, as, if the amendments were made, the affida-

vits would be falsified: *Ex parte* Whitby, 3 Man. & G. 201; S. C. *Ex parte* Witty, 9 Dowl. P. C. 838; *Re* White, 3 Scott, N. R. 591.

The affidavit must, in Ireland, or Scotland, be sworn before a commissioner appointed by the Court of Common Pleas in England: *Re* Anderson, 2 Scott, 626; 2 Bing. N. C. 435.

These affidavits were formerly required to be stamped with a 2s. 6d. stamp, not being made in any suit: see *Ex parte* Branson, 4 Scott, 539; *Re* Branson, 3 Bing. N. C. 783. But by the 4 & 5 Vic. c. 34, the stamp duty of 2s. 6d. on all affidavits to be filed, read, or used in any of the Courts of Law or Equity at Westminster, &c., is repealed,

By the eighty-seventh section, the officer of the Court of Common Pleas with whom the certificates shall be lodged is to make and keep an index of the same, which is to contain the names of the married women and their husbands alphabetically arranged, and the dates of the certificates and of the deeds to which the same shall respectively relate, and such other particulars as shall be found convenient ; and every certificate is to be entered in the index as soon as may be after the certificate shall have been filed.

By the eighty-eighth section, after the filing of the certificate the officer with whom the certificate shall be lodged is required at any time to deliver a copy, signed by him, of any certificate to any person applying for a copy ; and every such copy is to be received as evidence of the acknowledgment of the deed.

By the eighty-ninth section, the chief justice of the Court of Common Pleas is from time to time to appoint the officer with whom the certificates shall for the time being be lodged, and to remove him at pleasure ; and the Court of Common Pleas at Westminster is also from time to time to make such orders and regulations as the Court shall think fit touching the mode of examination to be pursued by the commissioners to be appointed under the act, and touching the particular matters to be mentioned in the memorandums and certificates, and the affidavits verifying the certificates, and the time within which any of the aforesaid proceedings shall take place, and touching the amount of the fees or charges to be paid for the copies to be delivered by the clerks of the peace or their deputies, or by the officer of the court as thereinbefore directed, and also of the fees or charges to be paid for taking acknowledgments of deeds, and for examining married women, and for the proceedings, matters, and things required by the act to be had, done, and executed for completing and giving effect to such acknowledgments and examinations.

By the ninetieth section, in every case in which a husband and wife shall, either in or out of court, surrender into the hands of a lord of a manor any lands held by copy of court roll, parcel of the manor, and in which she alone, or she and her husband in her right, may have an equitable estate, the wife is upon such surrender being made to be separately examined by the person taking the surrender in the same manner as she would have been if the estate to which she alone, or she and her husband in her right may be intitled in the lands, were an estate at law instead of a mere estate in equity ; and every such surrender, when such examination shall be taken, is to be

binding on the married woman, and all persons claiming under her ; and all surrenders theretofore made of lands similarly circumstanced, where the wife shall have been separately examined by the person taking the surrender, are declared to be good and valid.

The following orders, in pursuance of the above act, were made in Michaelmas Term, 1833.

“ WHEREAS, by the 84th section of the statute made in the third and fourth years of the reign of his present Majesty, chap. 74, intituled ‘ An act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance,’ the Court of Common Pleas is authorized from time to time to make alterations in the memorandums and certificates in the said section mentioned. ’

“ AND WHEREAS by the 89th section of the said act it is enacted, that the Lord Chief Justice of the Court of Common Pleas at Westminster shall from time to time appoint the person who shall be the officer with whom such certificates as in the said act are mentioned shall for the time being be lodged, and may remove him at pleasure, and that the Court of Common Pleas at Westminster shall also from time to time make such orders and regulations as the said Court shall think fit touching the mode of examination to be pursued by the commissioners to be appointed under the said act, and touching the particular matters to be mentioned in such memorandums and certificates as therein mentioned, and the affidavits verifying the certificates and the time within which any of the aforesaid proceedings shall take place; NOW IT IS ORDERED, that, in addition to the form of the certificate mentioned in the 84th section of the said act, after stating the names of the parties and the words ‘ and acknowledge the same to be her act and deed,’ the following words should be inserted: ‘ And I [*or we*] do further certify, that the several premises comprised in the said indenture are situate in the parish or several parishes and place or places following, that is to say, in the parishes of (*as the case may be*), in the county of .

“ AND IT IS FURTHER ORDERED, that where the acknowledgments shall be made before commissioners appointed under the said act, one at least of the said commissioners shall be a person who is not concerned as the attorney, solicitor, or agent, or clerk to the attorney, solicitor, or agent of any of the parties in the transaction giving occasion to the taking such acknowledgment; and that in the

affidavit verifying the certificate it shall be deposed, in addition to the verification thereof, that one or more of the persons making such affidavit knew the person or persons making such acknowledgment, and that at the time of making such acknowledgment the person or persons making the same was or were of full age and competent understanding, and that one at least of the commissioners taking such acknowledgment is not the attorney, solicitor, or agent, or clerk to the attorney, solicitor, or agent of any of the said parties, and that the names and residences of the said commissioners, and also the place or places where such acknowledgment or acknowledgments shall be taken, shall be mentioned in such affidavit.

“AND IT IS FURTHER ORDERED, that the commissioners do inquire of married women whether they intend to give up their interest in the estate to be passed by such deed without having any provision made for them in return for or in consequence of their so giving up such interest; and if it appears that any provision is to be made for any such married woman, they shall not take her acknowledgment until they are satisfied that such provision has been actually made; and one of the said commissioners shall state in the affidavit so to be made as aforesaid that such inquiry was made, and also the answer given thereto, and where any such provision has been agreed to be made that he the said commissioner is satisfied that the same has been made, and where such married woman in answer to such inquiry shall declare that she intends to give up her interest without any provision, that he the said commissioner has no reason to doubt the truth of such declaration, and verily believes the same to be true.

“AND IT IS HEREBY FURTHER ORDERED, that the affidavits verifying such certificate, where the acknowledgment is taken by a judge or Master in Chancery, be in the form hereunto annexed, marked A, and where before any of the commissioners appointed in pursuance of the said act, in the form hereunto annexed, marked B, with such variations only as the circumstances of the case shall render necessary.

“AND IT IS HEREBY FURTHER ORDERED, that the certificates and the affidavits verifying the same shall be delivered to the officer to be so appointed within one month from the making the acknowledgment, and that the officer shall not receive the same after that time without the direction of the Court or a judge.

N. C. TINDAL.

J. B. BOSANQUET.

S. GASELEE.

E. H. ALDERSON.’

A.

“ FORM OF AFFIDAVIT *verifying the certificate, where the acknowledgment is taken before a Judge or Master in Chancery.*

A. B., of _____, maketh oath and saith, that he knows _____, the wife of _____, in the certificate hereunto annexed mentioned; and that the acknowledgment therein mentioned was made by the said _____, and the said certificate signed by the said _____ (Judge or Master) therein-mentioned, in the presence of this deponent; and this deponent further saith, that the said _____ was at the time of making such acknowledgment of full age and competent understanding.

B.

“ FORM OF AFFIDAVIT *verifying the certificate, where the acknowledgment is taken by any of the Commissioners appointed in pursuance of the act of parliament.*

A. B., of _____, in the county of _____, gentleman, one of the attornies of His Majesty's Court of Westminster, at _____, and one of the commissioners named in the certificate hereunto annexed, maketh oath and saith, that he knows _____, the wife of _____, in the said certificate mentioned, and that the acknowledgment therein mentioned was made by the said _____, and the certificate signed by the commissioner, in the said certificate mentioned, on the day and year therein mentioned, at _____, in the county of _____, in the presence of this deponent, and that at the time of making such acknowledgment the said _____ was of full age and competent understanding; and that the said _____ knew the same acknowledgment was intended for the passing her estate and estates in the premises respecting which such acknowledgment was made; and this deponent further saith, that he this deponent [*or the said I. K., as the case may be, adding, if not the commissioners making the affidavit, whose place of residence is at* _____] is not concerned as the attorney, solicitor, agent, or clerk to the attorney, solicitor, or agent of any or either of the parties to the transaction giving occasion to the taking such acknowledgment; and this deponent further saith, that, in pursuance of the order made by the Court of Common Pleas in Michaelmas Term, 1833, the said commissioners did inquire of the said

[*or, if more than one*, of each of them the said] whether she intended to give up her interest in the estate in respect of which such acknowledgment was taken without having any provision made for her in return for, or in consequence of her so giving up her interest in such estates, and that in answer to such inquiry the said declared that she did intend to give up her interest in the said estates without having any provision made for her in return for or in consequence of her so giving up her interest; which declaration of the said this deponent has no reason to doubt the truth of, and verily believes the same to be true [*or declared that a provision was to be made for her in consequence of her giving up her interest in the said estates; and this deponent, before her acknowledgment was so taken, was satisfied, and does now verily believe, that such provision has been made.*]

“ N.B. When the whole of the facts cannot be spoken to by one deponent, the necessary alterations must be made to enable more than one deponent to state their respective parts of it.”

But the preceding rules were revoked by the following rules made on the last day of Hilary Term, 1834.

“ WHEREAS it has been found expedient to make alterations in the general rules made in Michaelmas Term last by this Court for the purpose of carrying into effect the statute passed in the third and fourth years of the reign of his present Majesty, cap. 74, intituled ‘ An act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance.’

“ AND WHEREAS it is necessary to make orders touching the amount of the reasonable fees and charges to be taken by the several persons appointed to carry the powers of the said act into execution, and it will be convenient that all the orders and regulations made by the Court under the said act should be contained in the same rule.

“ NOW IT IS HEREBY ORDERED, that the said general rules be, and the same are hereby revoked: Provided that this present rule shall not be construed in any respect to invalidate any proceedings which before the 1st day of March next ensuing shall have been taken pursuant to the direction of the said rules of Michaelmas Term last.

“AND IT IS HEREBY FURTHER ORDERED, that where any acknowledgment shall be made by any married woman of any deed under or by virtue of the said act, before commissioners appointed under the said act, one at least of the said commissioners shall be a person who is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor or agent, so interested or concerned.

“AND IT IS FURTHER ORDERED, that before the commissioners shall receive such acknowledgment, they, or in case one of them shall be interested or concerned as aforesaid, then such one of them as shall not be so interested or concerned, do inquire of every married woman separately and apart from her husband, and from the attorney or solicitor concerned in the transaction, whether she intends to give up her interest in the estate to be passed by such deed without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such interest: and where such married woman in answer to such inquiry shall declare that she intends to give up such her interest without any provision, and the said commissioners shall have no reason to doubt the truth of such declaration, and shall verily believe the same to be true, then they shall proceed to receive the said acknowledgment; but if it shall appear to them, or such one of them as aforesaid, that it is intended that provision is to be made for any such married woman, then the commissioners shall not take her acknowledgment until they are satisfied that such provision has been actually made by some deed or writing produced to them, or if such provision shall not have been actually made before, then the commissioners shall require the terms of such intended provision to be shortly reduced into writing, and shall verify the same by their signatures in the margin, at the foot, or at the back thereof.

“AND IT IS HEREBY FURTHER ORDERED, that the affidavit verifying the certificate to be made pursuant to the said act, and which certificate shall be in the form contained in the said act, shall (except in such cases where the acknowledgment shall be taken elsewhere than in England, Wales, or Berwick-upon-Tweed) be made by some practising attorney or solicitor of one of the courts at Westminster, or of one of the Counties Palatine of Lancaster or Durham, and that in all cases it shall be deposed, in addition to the verification

of the said certificate, that the deponent (or if more than one person join in the affidavit, that one or more of the deponents) knew the person or persons making such acknowledgment; and that, at the time of making such acknowledgment, the person or persons making the same was or were of full age and competent understanding; and that one at least of the commissioners taking such acknowledgment to the best of his (deponent's) knowledge and belief is not in any manner interested in the transaction giving occasion for the taking of such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned; and that the names and residences of the said commissioners, and also the place or places where such acknowledgment or acknowledgments shall be taken, shall be set forth in such affidavit: and that previously to such acknowledgment being taken the deponent had inquired of such married woman (or if more than one, of each of such married women) whether she intended to give up her interest in the estate to be passed, and also the answer given thereto; and where any such married woman, in answer to such inquiry, shall declare that she intends to give up her interest without any provision, the deponent shall state that he has no reason to doubt the truth of such declaration, and he verily believes the same to be true. And where any provision has been agreed to be made, the deponent shall state that the same has been made by deed or writing, or, if not actually made before, that the terms of the intended provision have been reduced into writing, which deed or writing he verily believes has been produced to the said (Judge, Master, or) commissioners.

“AND IT IS HEREBY FURTHER ORDERED, that the *affidavit* shall state the parish or several parishes, or place or several places, and the county and counties in which the several premises, wherein any such married woman shall appear to be interested, shall by deed be described to be situate.

“AND IT IS HEREBY FURTHER ORDERED, that the affidavit shall be in the form hereunto annexed, subject to such variations as the circumstances of the case shall render necessary, or such affidavit shall be made, where it is found convenient by one of the said commissioners, with such variation in the form thereof as shall be necessary in that behalf. (a)

(a) In *In re Scholefield* (3 Scott, 657; it was held that the affidavit may be 1 Bing. N. C. 293; 5 Dowl. P. C. 363), made by one of the commissioners who

"AND IT IS HEREBY FURTHER ORDERED, that the certificates and affidavits verifying the same shall, within one month from the making the acknowledgment, be delivered to the proper officer appointed under the said act; and that the officer shall not after that time receive the same without the direction of the Court or a judge.

"AND IT IS HEREBY FURTHER ORDERED, that the fees or charges (*a*) to be paid for the copies to be delivered by the clerks of the peace or their deputies, or by the officer of the said court, and for taking acknowledgments of deeds, and for examining married women, and for the proceedings, matters, and things required by the said act to be had, done, and executed for completing and giving effect to such acknowledgments and examinations, shall be as follows:—

took the acknowledgment, provided he be a practising attorney, and one of the commissioners have no interest in the affair. Tindal, C. J., observed that there could be little doubt but that the primary intention of the rules was that the married woman should have the triple security of the two commissioners and another professional man. It was at first contemplated that the commissioners should make affidavit of the due taking of the acknowledgment; but many solicitors of eminence being of opinion that full credence ought to be given to the commissioners' certificate, their suggestion was attended to. Some inconvenience being found to arise from a third party being required to make the affidavit, it was afterwards thought better, that, where convenient, the affidavit should be allowed to be made by one of the commissioners.

The effect of this decision is, that although the third section of the rules of Hil. T., 4 W. 4., directs that the examination of the married woman shall take place before the disinterested and unconcerned commissioner, "separately and apart from the *solicitor concerned* in the transaction," yet, where the person who makes the affidavit is (as, it seems, he now may be) both one of the commissioners and the solicitor concerned for the wife, she must also go

through the ceremony of examination before *him*, to enable him to make the required affidavit. The sixth section of the same rules, which permits the affidavit to be made by one of the commissioners, allows "*necessary variations* to be made in the form thereof:" but there is nothing to warrant a deviation in *any case* from the course of examination prescribed by the third section.

One difficulty that seems to arise from this course is, that, inasmuch as the certificate is not required to state that the inquiries mentioned in the affidavit have been duly made of the married woman prior to the taking of her acknowledgment, there is nothing *upon oath* to satisfy the Court that these inquiries have been made, except the statement of the commissioner who is concerned as the party's solicitor; the very person who is so studiously excluded from the examination. See the reporter's note to this case, 3 Scott, 660.

(*a*) The charges for taking acknowledgments, &c., and for proceedings under the act, have been held not to be taxable items within the 2 G. 2, c. 23, the deed acknowledged being merely a statutory conveyance: *Ex parte Branson*, 4 Scott, 539; 5 Dowl. P. C. 623; *Re Branson*, 3 Bing. N. C. 783. But see now the 6 & 7 Vic. c. 73. sec. 37.

	£.	s.	d.
To a Judge or Master for taking the acknowledgment of every married woman, of which 7s. 6d. will be paid, in the case of a judge, to his clerk, and the residue thereof will be paid over to the treasury ; and in the case of a Master, the whole will be paid over to the treasury, or the fee fund account of the Court of Chancery - -	1	6	8
To the two perpetual commissioners for taking the acknowledgment of every married woman, when not required to go further than a mile from their residence, being 13s. 4d. for each commissioner - - -	1	6	8
To each commissioner, when required to go more than one mile, but not exceeding three miles, besides his reasonable travelling expences - - - - -	1	1	0
To each commissioner, where the distance required shall exceed three miles, besides his reasonable travelling expences - - - - -	2	2	0
To the clerk of the peace, or his deputy, for every search	0	1	0
To the same, for every copy of a list of commissioners, provided such list shall not exceed the number of 100 names - - - - -	0	5	0
To the same, for every further complete number of 50 names, an additional - - - - -	0	2	6
To the officer, for every search - - - - -	0	1	0
To the same, for every official copy of the certificate -	0	2	6
To the same, for every official copy of a list of commissioners, provided such list shall not exceed the number of 100 names - - - - -	0	5	0
To the same, for every further complete number of 50 names - - - - -	0	2	6
To the same, for preparing every special commission, including a fee of 5s. to the clerk of the chief justice, or other judge for the fiat - - - - -	0	15	0
To the same, for examining the certificate and affidavit, and filing and indexing the same, as required by the said act of 3rd & 4th Will. 4, c. 74 - - - - -	0	5	0

“AND IT IS HEREBY FURTHER ORDERED, that the fees and charges to be paid for the entries of deeds, required by the said act to be entered on the court rolls of manors, and for the indorsements

thereon, and for taking the consents of the protectors of settlements of land held by copy of court roll, where such consents shall not be given by deed, and for taking surrenders, by which dispositions shall be made under the said act by tenants in tail of lands held by copy of court roll, and for entries of such surrenders, or the memoranda thereof, on the court rolls, shall be as follows:—

	£.	s.	d.
For the indorsements on the deed of the memorandum of production and memorandum of entry on court rolls, to be signed by the lord steward or deputy steward, each indorsement of memorandum, 5s.; together	-	-	0 10 0
For the entries on the court rolls of deeds, and the indorsements thereon, at per folio of 72 words	-	-	0 0 6
For taking the consent of each protector of settlement of lands	-	-	0 13 4
For taking the surrender by each tenant in tail of lands	0	13	4
For entries of such surrenders, or the memoranda thereof, in the court rolls, at per folio of 72 words	-	-	0 0 6

N. C. TINDAL.

J. A. PARK.

J. B. BOSANQUET.

E. H. ALDERSON."

FORM OF AFFIDAVIT, verifying the certificate of acknowledgment taken in pursuance of the act of parliament, to be made by some practising attorney or solicitor, and to be sworn before a judge of the Court of Common Pleas, or a commissioner appointed for taking affidavits in the said Court.

In the Common Pleas:—

A. B., of _____, in the _____ of _____, gentleman, one of the attorneys [or solicitors] of the Court of _____, maketh oath and saith, that he knows _____ the wife of _____ in the certificate hereunto annexed mentioned, and that the acknowledgment therein mentioned was made by the said _____, and the certificate signed by the Judge [or Master, or by A. B. of &c., and C. D. of &c., the commissioners] in the said certificate mentioned, on the day and year therein mentioned, at _____, in the _____ of _____,

deponent, variations may be made to enable more than one deponent to state their respective parts of the affidavit.

The following additional orders were made in Trinity Term, 1834 : —

“ IT IS ORDERED, that from and after the last day of this term, where such parts of the affidavit verifying the certificate of acknowledgment, taken in pursuance of the late act of parliament respecting fines and recoveries, as state ‘ the deponent’s knowledge of the party making the acknowledgment, and her being of full age,’ cannot be deposed to by a commissioner, or by an attorney or solicitor, the same may be deposed to by some other person, whom the person before whom the affidavit shall be made shall consider competent so to do.

“ AND IT IS FURTHER ORDERED, that where more than one married woman shall at the same time acknowledge the same deed, respecting the same property, the fees directed by the said rules to be taken shall be taken for the first acknowledgment only.

“ And the fees to be taken for the other acknowledgment or acknowledgments, how many soever the same may be, shall be one-half of the original fees, and so also where the same married woman shall at the same time acknowledge more than one deed respecting the same property.

“ And where in either of the above cases there shall be more than one acknowledgment, all such acknowledgments may be included in one certificate and affidavit.

“ In every case the acknowledgment of a lease and release shall be considered and paid for as one acknowledgment only.

N. C. TINDAL. S. GASELEE.

J. A. PARK. J. B. BOSANQUET.” (a)

The general rules of Hil. T. do not direct how certificates of acknowledgment taken under special commissions are to be verified.

(a) As to these provisions, the policy of which appears in many respects to be very questionable, see Mr. Hayes’s observations, 2 Hayes Convey. 219, *et seq.* 5th ed.; a work which is probably in the hands of most practitioners, and where the forms of the proceedings under the act will be found.

The practice as to those taken abroad appears to be regulated by the practice which prevailed in the Court of Common Pleas, under the rule of the Court of Hil. T. 14 G. 3. relating to common recoveries, (which was extended to the case of fines levied abroad: 1 Taunt. 144.) by which it is ordered "that if the party or parties shall be in Ireland, or in any other part or parts beyond seas, then the affidavit or affidavits shall be made by one of the commissioners who hath taken the acknowledgment of the warrant or warrants of attorney, and shall be sworn either before some person duly authorised to take affidavits in this Court, or before some magistrate of the place where such acknowledgment shall be taken, having authority to administer an oath, and in the presence of a public notary, which notary shall also certify in writing, under his hand and seal, as well the due administering of this oath, as also the name, signature, and office of the magistrate administering the same."

It has been held that the 6 G. 4. c. 87. s. 20, which authorises a British consul at a foreign port to administer oaths, &c., does not give such consul power to act in cases of this nature, where there is a native authority to administer the oath. (*a*)

But where it appears that the British consul can administer an oath abroad by the laws of the place (as is the case at Madeira), which fact is duly authenticated by a certificate of a public notary, the certificate and other documents sworn before him will be received by the Court. (*b*)

It seems that notaries public are authorised to take affidavits in America. (*c*)

In *Davy to Maltwood* (*d*), an affidavit made in Russia before the British consul was held sufficient, it having been stated, in a notarial certificate made in a former case, that the laws of Russia do not grant authority to any magistrate to administer oaths to any person whatsoever.

In another case (*e*) the Court allowed the acknowledgment to be filed, the affidavit verifying the certificate being sworn before the minister of the British chapel at Moscow, it being sworn by the secretary of the Russian Company that that person was in the

(*a*) *In re Eady*, 6 Dowl. P. C. 615.

(*b*) *Ex parte Hutchinson*, 17 Law J. N. S. C. P. 111.

(*c*) *Ex parte Mann*, 5 Bing. N. C. 226; 7 Scott, 142. But see *Anon.* 3 Jur. 125.

(*d*) 2 Man. & G. 424; S. C. *ex parte Bayley*, 2 Scott, N. R. 523; *re Daly*, 9 Dowl. P. C. 380.

(*e*) *In re Pickersgill*, 6 Man. & G. 250; 6 Scott, N. R. 631.

habit of administering oaths to British subjects there, and it being certified by two merchants resident at Moscow that there is no English notary public, or British consul or vice-consul, within four hundred miles of that city.

So in a later case (a) the acknowledgment was permitted to be filed, when the affidavit was sworn before "the Provisional British consul for the Society Islands," it appearing that there was no notary or any other official person, before whom it could have been sworn, within many hundred miles.

The description and certificate must show that the affidavit was sworn before a properly constituted authority. Accordingly, the Court has refused to allow an affidavit and notarial certificate to be filed, the affidavit purporting to be sworn before one "G., a commissioner for taking affidavits in the Court of Queen's Bench, Canada West," and the notary certifying him to be a commissioner of *that* Court, and, *as such*, qualified to administer the oaths. (b)

The certificate of a notary public will be dispensed with where it cannot be procured.

Thus, upon an acknowledgment taken in a township in Pennsylvania, the Court, in lieu of a notarial certificate, received a certificate of an officer describing himself as "the prothonotary and clerk of the Court of Common Pleas in and for centre county Pennsylvania;" it being sworn that there was no notary public within eighty miles of the place. (c)

In a late case (d), the wife's acknowledgment was taken before commissioners in India, and an affidavit to that effect was sworn before a magistrate having competent authority. A person describing himself as "Major-General" certified that the affidavit had been so sworn, and that the authority was competent, and stated that there was no notary at the place. On affidavits of the general's handwriting and rank the Court held the certificate sufficient.

A British consul has, under the 6 G. 4. c. 87. s. 20, the same powers as a notary public to certify that the affidavit in support of the certificate was sworn before a commissioner duly appointed. (e)

Where an affidavit made in Pennsylvania varied in its title and

(a) *In re Darling*, 2 C. B. 347.

(b) *In re Street*, 2 C. B. 364.

(c) *Re Way and Campbell*, 6 Man.

& G. 1046; 7 Scott, 929; 1 Dowl. & L.

P. C. 250.

(d) *In re Daly*, 17 Law J. N. S. C.

P. 1.

(e) *In re Barber*, 2 Bing. N. C.

268; 2 Scott, 437.

commencement from the form prescribed by the rule of H. T. 4 W. 4., the affidavit being one upon which perjury could be assigned, the acknowledgment was allowed to pass. (a)

Where an acknowledgment was taken at Philadelphia, but the affidavit did not name the place where it was taken, it was received, the rule that it must be stated where the acknowledgment was taken applying only to England, where the commissioners are appointed to act for certain districts, it being there material to show that the acknowledgment was taken before the proper commissioner. (b)

Where the certificate of acknowledgment of a married woman *to bar her dower*, taken under a special commission, was verified by an affidavit written on paper, contrary to the usual practice of the court, by which such documents are required to be on parchment, it was held that the affidavit and other documents might be received and filed, the Court considering it not so necessary that the affidavit should be on parchment, where merely dower was barred, as where the estate in fee was passed. (c)

Where the acknowledgment is taken by a special commission, the affidavit may be filed subsequently to the filing of the certificate. (d)

The affidavit may be made in a foreign language, if it is translated, and the translation verified, and the oath may be administered in a foreign language, if it is translated by an interpreter to the deponent. (e)

The foreign affidavit will be the proper one to be filed. (f)

An affidavit signed by the judge of the country, but not by the deponent, has been held sufficient, the judge's signature being verified, and on an affidavit that such is the practice in Germany. (g)

In *Warburton to Warburton* (h), the Court permitted a certificate of an acknowledgment taken in the Presidency of Madras to be filed, though the affidavit, to excuse the want of a notarial certificate (which was sworn by one of the commissioners taking the acknowledgment, and was in other respects sufficient), erroneously stated that the affidavit verifying the certificate was sworn by the *other* commissioner, when, in fact, it was sworn by the deponent himself.

(a) *In re Shaw*, 6 Man. & G. 236; 3 Scott, N. R. 647; 9 Dowl. P. C. 839. (f) *Re Birch*, 6 Scott, 185; 4 Bing. N. C. 394.

(b) *Re Shufflebottom*, 6 Scott, 898.

(g) *In re Eady, ubi sup.*: see *re Birch, ubi sup.*

(c) *Ex parte Carr*, 17 Law J. N. S. C. P. 107.

(h) 3 Man. & G. 633; S. C. *re Taylor*, 4 Scott, N. R. 328.

(d) *Anon.* 1 Scott, 52.

(e) *In re Eady*, 6 Dowl. P. C. 615.

The order which requires the affidavit verifying the certificate to be made by a practising attorney or solicitor, contains an exception of cases where the acknowledgment is taken "elsewhere than in England, Wales, or Berwick-upon-Tweed." Indeed it would be impossible in such cases strictly to comply with the rule.

An affidavit made in Germany, by a notary public, has accordingly been received. (a)

No. XI.

On the Extent of the Liability of a Feme Covert's separate Estate to her Debts and Engagements. By Mr. Jacob. (b)

THE case of *Hulme v. Tenant* has been followed by *Heatly v. Thomas*, 15 Ves. 596, where a bond given by a feme covert was held a charge upon her separate estate; and by *Bullpin v. Clarke*, 17 Ves. 305, and *Stuart v. Kirkwall*, 3 Madd. 387; where the same decision was made with respect to promissory notes. These cases may be considered as establishing, that the separate estate of a married woman is liable to debts, for which she has given a written security. The cases do not, however, entirely agree as to the principle upon which this liability is founded.

In *Hulme v. Tenant*, Lord Thurlow proceeded upon the general principle, that a feme covert acting with respect to her separate property, was competent to act in all respects as if she were a feme sole. If she had by instrument contracted, that this or that portion of her separate estate should be disposed of in this or that way, she and her trustees might be decreed to make that disposition; but if she entered into an engagement which would make a feme sole personally liable, such general engagement entered into by a feme covert would not bind her as such. The determined cases, however, seemed to go thus far, that the general engagement of the wife should operate upon her personal property, and the rents and profits of her real estate. (c) In giving judgment he observed that he had no doubt

(a) *In re Pearsall*, 2 Scott, N. R. 188; 9 Dowl. P. C. 46.; S. C. *Pearsall to Pearsall*, 1 Man. & G. 973. vol. ii. p. 241 of his edition of Roper. The notes have been added by the present writer.

(b) *Vide supra*, vol. II. p. 252. These remarks formed a note by Mr. Jacob to (c) See *Aylett v. Ashton*, 1 M. & C. 112.

about this principle, that if a Court of Equity said that a feme covert might have a separate estate, the Court would bind her to the whole extent as to making that estate liable to her own engagements; as, for instance, for payment of debts, &c.

Lord Thurlow here treated the liability to general engagements as a necessary incident to separate estate, arising from the capacity of contracting which the possession of a separate estate confers; the only difficulty he felt was as to the mode in which execution was to be given to enforce the demand. The same view of the general liability of separate estate to debts appears to have been taken in several other cases. See *Peacock v. Monk*, 2 Ves. Sen. 193. *Lillia v. Airey*, 1 Ves. Jun. 277. *Norton v. Turvill*, 2 P. W. 144. (a) In this view, it was not necessary to consider the security given for the debt, as an appointment or assignment intended to attach specifically on the property; the principles laid down in *Hulme v. Tenant* apply equally to every contract, whether in writing or merely verbal. The suit in Equity was looked upon only as a process for recovering a general debt, in which execution was to issue against a particular species of property.

One difficulty, however, occurs in the reasoning which led to this conclusion. The possession of separate property was said to enable a feme covert to act as a feme sole in respect of that property. It did not however follow that the disability of coverture was so far removed, as to give her a capacity of contracting generally, in matters not connected with her separate estate. For this reason it was difficult to support the principle of holding the wife's separate property liable to her engagements, unless it appeared that such engagements were formed with reference to that property, and that the person contracting with her, contracted with her "not as a married woman merely, but as a married woman having separate estate." 9 Ves. 498. The subsequent authorities seem to have narrowed the liability to this extent, confining it to cases where the contract is entered into with an intention (either real or presumed) of affecting the separate estate, and holding it to be specifically liable on the ground of that intention. (b)

(a) See also *Owens v. Dickenson*, 1 Cr. & P. 54, where Lord Thurlow's observations were cited with approbation by Lord Cottenham: see also *Murray v. Barlee*, cited p. 251, *ante*.

(b) *Wainwright v. Hardisty*, 2 Beav. 365: *Crosby v. Church*, 3 Beav. 485: *Tullett v. Armstrong*, 4 Beav. 322.

In *Bolton v. Williams*, 2 Ves. Jun. 150, Lord Loughborough, adverting to the cases where the separate property of a feme covert had been held liable to a security given by her, said that the Court had there considered it as operating as an appointment of her separate property, and intimated that a general creditor could not have it applied in satisfaction of his debt. So also Lord Eldon, in speaking of *Hulme v. Tenant*, took a different view of that case from that which, according to the report, was taken by Lord Thurlow, considering it as depending on the supposition that the wife intended to charge her separate property, and as deciding that the execution of the instrument was a sufficient indication of that intention. See 8 Ves. 175 : 9 Ves. 493. 497 : 11 Ves. 225. The same principle has been explicitly stated by the Vice-Chancellor. In *Stuart v. Kirkwall*, 3 Madd. 389, his Honour observed, "that a feme covert being incapable of contract, this Court cannot subject her separate property to general demands; but that, as incident to the power of enjoyment of separate property, she has a power to appoint it, and that this Court will consider a security executed by her as an appointment *pro tanto* of her separate estate." In such cases the security is implied to be an execution of her power to charge the property. 3 Madd. 94. See *Aguilar v. Aguilar*, 5 Madd. 414. (a)

This rule of holding that a general security executed by a married woman, purporting only to create a personal demand, and not referring to her separate property, is intended as an appointment of that property, or a charge upon it, has often been remarked upon as a strong instance of implication, founded more upon a desire to do justice, than upon any satisfactory reasoning. The only argument in its favour seems to be, that the security must be supposed to have been executed with the intention that it should operate in some way, and that it can have no operation except as against the separate estate. See Lord Redesdale's observations in 2 Sch. & Lef. 264. (b) It might (perhaps with equal justice) be contended that all the pecuniary engagements of a feme covert should be considered as having

(a) So in *Field v. Sowle*, 4 Russ. 112, it was said that the Court acts upon the security of the wife, not as an agreement to charge her separate property, but as an equitable appointment. But, as Lord Cottenham remarked, in a late case, there is nothing in such a transaction which has any resemblance

to the execution of a power, although, what it is, it is not easy to define: *Owens v. Dickenson*, 1 Cr. & Ph. 53.; see also *Murray v. Barlee*, 3 M. & K. 223.

(b) And see *Wainwright v. Hardisty*, 2 Beav. 365 : *Crosby v. Church*, 3 Beav. 485 : *Tullett v. Armstrong*, 4 Beav. 322.

been formed with reference to her separate estate, as she has no other means of satisfying them.

It seems to be at present unsettled whether the separate estate will be rendered liable by a contract expressed in a memorandum or other document, not referring to the property, and not purporting to be a security for money. According to the late cases the question would be, whether the intention of affecting the separate estate, which is implied from the execution of a bond or other security, is also to be implied from written instruments of other descriptions. A point of this kind arose in *Francis v. Wigzell*, 1 Madd. 258, on a bill against a husband and wife, for the specific performance of an agreement entered into by them for the purchase of an estate. The Vice-Chancellor (Sir T. Plumer) observed, that in order to render the wife liable, it was necessary to show that she had a separate estate, and that she had contracted in respect of it. The case was decided on the ground that the bill was filed against the husband and wife only, and was not framed with a view to a decree against the wife's trustees, the only mode of affecting separate estate.

The extent to which separate property may be subjected to the demands of creditors, claiming under parol agreements, has not been determined. If the separate property consists of land (as in *Clark v. Miller*, 2 Atk. 379) it will of course not be liable. But if it consists of personalty, and the feme covert has verbally agreed that part of it shall be appropriated to payment of a debt, there seems to be no objection to holding that this agreement constitutes a lien. If, however, the verbal agreement be made without reference to the separate estate, it falls under the head of those general engagements which, according to the late cases, are not binding. But there may perhaps be cases, where, without evidence of an express promise by the feme covert to pay out of her separate estate, the circumstances may prove that that was in fact the nature of the agreement or understanding between her and the person with whom she has contracted. Thus, if a married woman be known to be living upon separate property and apart from her husband, it is generally inferred that her dealings with tradesmen and others who trust her take place on the credit of this property. (See *antè*, 110. Note. And *post*, chap. 22. Sec. 4.) (a) And hence such contracts might perhaps be considered in the same

(a) The authorities here referred to will be found *suprà*, chap. 22. sec. 3.

light as if the separate estate were expressly referred to as the fund for payment.

In two instances (*Anon.* 18 Ves. 258 : *Gregory v. Lockyer*, 6 Madd. 90), decrees were made for payment of the debts of married women out of their separate estates, after their deaths : but it does not appear whether they proceeded upon the notion of the property being liable generally, or whether they turned upon other circumstances : the debts might have been charged on the property by her will, or the decrees might have been intended to leave the question of the extent of the liability open for discussion, when the circumstances under which the different debts were contracted should be ascertained. The death of the wife could not on principle make any difference. In *Court v. Jeffrey*, 1 Sim. & Stu. 106, the Vice-Chancellor distinguished between the administration of assets in ordinary cases and the administration of the separate estate of a deceased married woman, on the ground that in the latter case the interest of the legatees could not be defeated by debts.

In *Clinton v. Willis*, Rolls, 15 Dec. 1820 (cited Sugden on Powers, 115) (a), a similar decree had been made by consent or agreement between the parties. A question was raised whether the Master ought to have allowed debts not secured by any written instruments. The report had been confirmed, and the Master of the Rolls (Sir T. Plumer) therefore said that the objection came too late; but his opinion appeared to incline against it; he asked why a verbal direction should not be sufficient? (b)

In *Gregory v. Lockyer*, the decree also directed the payment of the wife's funeral expenses out of her separate estate; but the Vice-Chancellor expressed a doubt whether the husband was intitled to throw these expenses on the fund. In *Bertie v. Lord Chesterfield*, 9 Mod. 31, it was decided that the husband was bound to pay the expenses of the wife's funeral, though the latter had a settlement of separate maintenance, with power to make a will, by which she had disposed of some property in legacies.

(a) 1 Sug. Pow. 206 n., 7th ed.

(b) In *Owens v. Dickenson*, 1 Cr. & Ph. 55, where the wife had by will charged her separate property with the payment of her debts, Lord Cottenham remarked that it seemed strange that there should be any difference between a contract in writing, when no statute

required it, and a verbal promise to pay. It was an artificial distinction not recognised in any other case. However, he did not decide the point, but referred it to the Master to inquire what debts there were to be paid under the provisions of the will, with liberty to state special circumstances.

The different principles upon which the liability of separate estate to debts has been supported, lead to some practical results, materially different.

In the case referred to above, which is shortly reported in 18 Ves. 258, it appears to have been held that in the administration of separate estate amongst creditors, all were to come *in pari passu*, and it is plain that this must be the course of administration, if the principle be that the separate property of a feme covert is liable to her debts generally, and that her contracts are for this purpose looked upon as the contracts of a feme sole. But if the principle be (according to the later cases) that the separate property of a feme covert is liable only to contracts made with the intention of affecting that property, and that a security executed by her operates as any appointment or charge creating a lien, it seems to follow that if there be several creditors claiming under such securities, the ordinary rules applicable to specific incumbrancers ought to be applied to them, and that they are therefore to be paid according to their priorities in point of time. On the same principle a creditor by bond or promissory note, having a specific lien on the fund, would (in the absence of any special circumstances) prevail over a subsequent purchaser, to whom the whole fund has been appointed or assigned.

In *Nantes v. Corrock*, 9 Ves. 182, it was alleged that the defendant, a feme covert, had, while in the service of the plaintiff's testator, received monies on his account, and appropriated part to her own use, and one of the objects of the suit was to have an account of her receipts and expenditure, in order that the balance might be paid out of her separate estate consisting of stock; but the Lord Chancellor refused this part of the relief prayed, on the ground that stock is by law exempt from execution and sequestration, and is therefore not liable, except at the suit of persons showing a lien upon it. For the same reason it will follow that stock settled to the separate use of a married woman, cannot during her life be rendered liable to creditors, if their demands be considered as general debts merely. This difficulty, however, will not exist with respect to debts due on bonds or other securities, if the principle be that they operate by way of appointment or charge, giving a lien on the fund.

The above remarks apply to the liability of separate estate to express contracts. With respect to other demands arising from

circumstances, under which an implied contract would be raised at law, it has been settled by *Bolton v. Williams*, and *Jones v. Harris*, cited *suprà*, that they do not attach on separate estate: those cases were followed in *Aguilar v. Aguilar*, 5 Madd. 414. If, however, property has been fraudulently acquired by a feme covert, and transferred to trustees for her separate use, the parties intitled may follow it, and recover it from the trustees, if still in their hands. *Greatley v. Noble*, 3 Madd. 79. But it seems from this case that her separate estate would not be liable to answer for the property acquired by the fraud, unless identified and traced into the hands of her trustees. On this question see *Nantes v. Corrock*, *ub. sup.*

No. XII.

Objections to the Legality of Deeds of Separation considered. By Mr. Jacob. (a)

It has been observed that the legal effect of contracts relative to separation has been considerably narrowed. In several modern cases opinions have been expressed, that such contracts are so much at variance with the policy of the law which fixes the duties of domestic life, that it would be more consistent with sound legal principle not to allow their operation, even in its present qualified extent. 2 Bos. & Pull. 107: 8 T. R. 546: 11 Ves. 537: 3 Mer. 268: *Westmeath v. Westmeath*, Jac. 126.

In considering this question, high as the authority of these opinions is, some doubt arises from contrasting them with those which previously prevailed, and from observing that this view of the nature of the agreements in question does not appear to have suggested itself to the Courts until a very late period. The case of *Beard v. Webb*, 2 Bos. & Pull. 93, seems to be the first in which it was intimated that such agreements ought to be deemed contrary to the policy of the law. In *Legard v. Johnson*, the objection turned on different grounds. Before that time the legality of deeds of separation was constantly recognised, apparently without a suspicion of their being open to any moral or legal objection. Some favour even had been shown to such arrangements; the Courts having, in order to give

(a) *Vide suprà*, vol. II. p. 306. These remarks formed Mr. Jacob's note to vol. ii. p. 273 of his edition of Roper.

effect to them, gone so far as to introduce several anomalous exceptions to the ordinary rules of law. Since these have been overruled, it will perhaps be found that there is no inconsistency between the principles of law and the practice as now settled with respect to deeds providing a separate maintenance for a wife.

It may be observed, that the law does not directly prohibit a husband and wife from living in a state of voluntary separation. Either is intitled to compel cohabitation; but so long as both are contented with their state of separation, there is no law to prevent or punish its continuance. The Ecclesiastical Courts do not interfere in these cases, even when the fact of separation comes judicially before them, unless their assistance be prayed by one of the parties. If a suit for a divorce, or for a declaration of nullity of marriage, fails, the sentence is confined to a mere dismissal of the suit, not proceeding to direct a return to cohabitation. 1 Hagg. 129. 156. 408; 2 Hagg. 168. 198. 262. And the compromise of a suit for restitution of conjugal rights appears not to be prohibited. 2 Hagg. 320.

The objection that a separation interferes with duties enjoined by morality, is one that does not arise, unless it be proved in the particular case, or assumed universally, that the separation has taken place without sufficient cause. Whether the temporal Courts would now inquire into the sufficiency of the cause, with a view to deciding on the legality of the deed; and whether, if they did, they would hold no cause to be sufficient, except such as the Ecclesiastical Courts admit, is still questionable. But if the temporal Courts (according to their present inclination) decline to enter, for this purpose, upon an inquiry into the circumstances which have led to the separation, it would be a strong measure to assume universally that those circumstances could not have been such as to afford a legal or moral justification; and that the separation must therefore necessarily be inexcusable, unless it has been established by the Ecclesiastical Courts.

Even those courts, though looking with jealousy on private arrangements of this kind, do not act upon any such rule. When a suit for restitution of conjugal rights, between parties who have been living in a state of separation, comes before them, they do not assume that that state is unlawful, because it has been voluntary, and on that ground at once decree a return to cohabitation; but they admit the defendant to plead misconduct on the part of the plaintiff, rendering a separation necessary: and it seems that there may be cases where the circumstances, though not sufficient to found a sentence of

separation *à mensâ et thoro*, may yet justify the party who has withdrawn from cohabitation, and therefore furnish a defence to the suit for restitution of conjugal rights. See 2 Hagg. 302. 313. 320: and *Molony v. Molony*, 2 Addams, 249. In suits for divorce on the ground of the wife's adultery, it is expected to be shown that the husband has not cohabited with her since the discovery of her offence, and this is usually pleaded. 2 Phill. 163. So also alimony is allowed to the wife, with a view to her living separately during the pendency of any matrimonial suit: this allowance is granted as well when she is plaintiff as when she is defendant, and at an early stage of the cause, before the grounds of her complaint have been investigated. See 2 Hagg. 199. 204. These Courts do not therefore treat a state of separation as necessarily unlawful, because it has not been preceded by their sentence.

Neither do the Courts of law adopt any such view. The plaintiff, in an action for criminal conversation, would meet with but little success, if, after his wife's misconduct came to his knowledge, he had continued to cohabit with her, waiting till a sentence of divorce could be obtained. So, if the wife leaves her husband in consequence of ill treatment, her conduct in separating herself from him is held to be justifiable; and on this ground he is still liable for her necessary expenses. He is discharged from this liability by her committing adultery, because the law holds that such misconduct justifies him in separating from her.

Thus a state of separation, not sanctioned by the sentence of an Ecclesiastical Court, is not universally condemned by the law. It is obvious that, in a moral point of view, the sentence can make no difference. The propriety of the separation must depend upon the conduct and circumstances which have led to it.

If then the husband by deed grants an annuity for the purpose of maintaining the wife while she may be living apart from him, that purpose is not contrary to any law, nor is it necessarily contrary to any moral duty. In many instances it does only that which, under the circumstances, the Ecclesiastical Courts, if applied to, would have decreed: and the temporal Courts, in declaring a deed of separation to be void, might perhaps be undoing that arrangement which the Ecclesiastical Courts would have confirmed.

The case of *Bateman v. Ross*, 1 Dow, 235, decided by the House of Lords, is a strong authority on this point. Disputes between the husband and wife having been referred to arbitration, an award was

made, directing certain property to be given up to the separate use of the wife, during the joint lives of herself and her husband, provided they should so long live separate and apart. The award was established and enforced by the decree of Lord Redesdale, and his decree was affirmed. The Lord Chancellor said, "it was objected to the award, that it assumed the jurisdiction of an Ecclesiastical Court, and went beyond the submission, in awarding a separation. But it did no such thing. It assumed that there must be a separation, and provided accordingly." The same principles must apply to a deed not going further than to secure property to the wife during such time as the separation may continue.

If the deed, besides providing a separate maintenance, contains clauses purporting to preclude the parties from resuming their conjugal rights, these are, as we have seen, held by the Ecclesiastical Courts to be illegal, and perhaps they may be so held by the temporal Courts: but if illegal, they do not necessarily vitiate the whole deed, as they do not form the consideration for the allowance covenanted to be paid by the husband. The indemnity, if the deed provides it, is the consideration: if not, it is held to stand upon the footing of a voluntary grant.

The objections, therefore, to the permission of deeds of separation, must rest, not so much upon any opinion of their being directly inconsistent with any part of the law, as upon grounds of policy, and arguments against their tendency; arguments which might be urged with almost equal effect against the whole doctrine of separate property, and as to which there is certainly room for much difference of opinion.

The policy of these deeds must depend, in some measure, upon the effect which the Courts of civil jurisdiction may give to those clauses which attempt to prevent either party from compelling a return to cohabitation. They may possibly hold (as indeed they have done formerly) that under some circumstances a contract for permanent separation should be held binding, the consequence of which would be to establish a peculiar and anomalous species of divorce. If, on the other hand, the views of the Ecclesiastical Courts should be adopted, and it should be held that parties cannot by their own act abandon irrevocably the rights and duties of marriage, the consequence will be, that the deed will not furnish any means of prolonging the separation, if the proper tribunals think that it ought not to continue: it will leave open to the Ecclesiastical Courts the consideration of the

question whether the cohabitation ought to be renewed, and therefore will not interfere with any rights or duties which are cognizable by law.

Whatever may be the ultimate determination of this question, it can scarcely be contended that the rule which allows deeds of separation, is in all cases productive of unmixed evil. And it may be doubted whether there is any principle of policy which requires that matrimonial disputes (unlike all others) should never be settled by private adjustment, and which renders it better to litigate than to compromise them. In cases where there has been on one side that species of misconduct, which, according to law, ought to be followed by a state of separation, the public is not injured if the guilty party acquiesces, without a judicial process, in that state which the law has declared to be right. In other cases, where the conduct has not been such as to form a ground, according to the law of the Ecclesiastical Courts, for a compulsory divorce, it is still a material question whether causes of less moment may not morally justify a separation by consent. And though the circumstances may sometimes be such as not even to afford a moral justification, it is to be remembered that the law does not undertake the task of enforcing every moral duty; and while the parties immediately concerned are satisfied, it is by no means clear that any public interest renders it necessary for courts of justice to interfere, and enter in each case upon an inquiry into moral conduct; an inquiry often so difficult and intricate, that any conclusion which they might arrive at would be as likely to be wrong as to be right.

The wide difference between the views of different Judges upon these points, proves that it is at least questionable whether the toleration at present allowed to voluntary separations ought to be withdrawn, and that, if any new rule be required, it is more fit that it should be introduced by a legislative enactment, than by a judicial decision founded upon individual opinions on a doubtful question of expediency.

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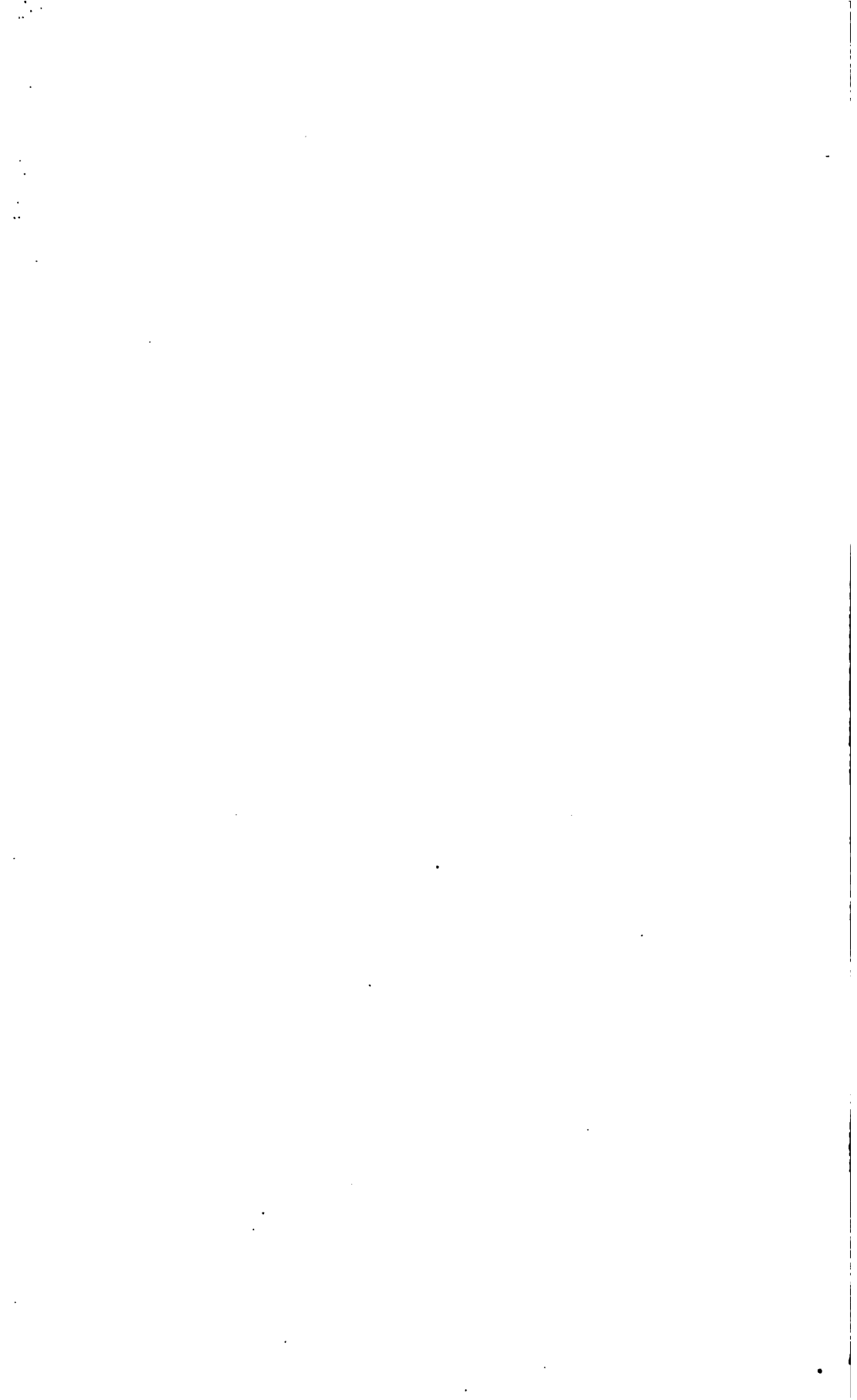
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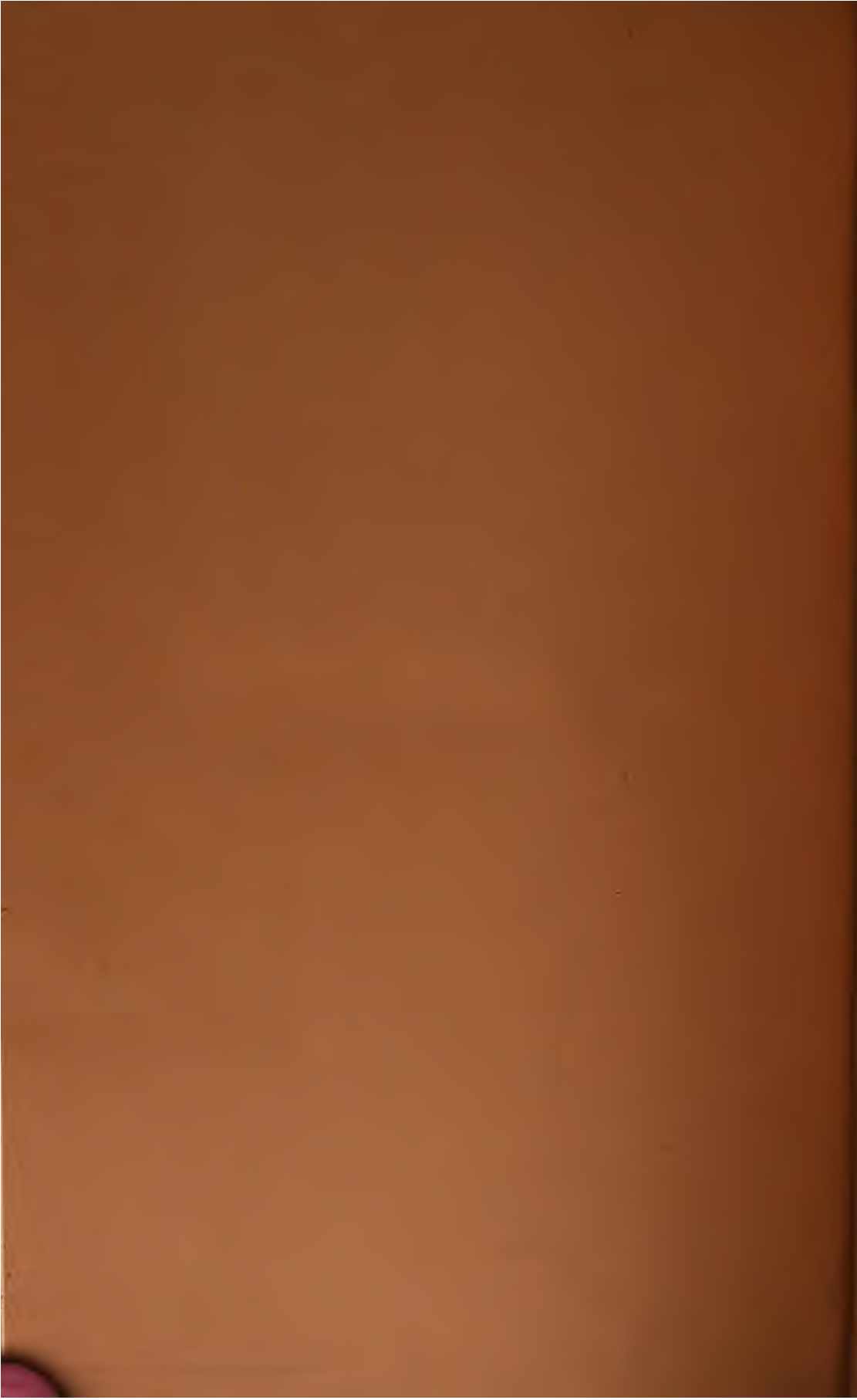
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